Supreme Court, U.S.
FILED

931666 APR 5 1994

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

EDWARD H. STEVENS, III,
Petitioner

v.

THE BOARD OF LAW EXAMINERS OF THE STATE OF TEXAS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Board of Law Examiners ("the Board") denied the application of Stevens, a Mississippi lawyer, to practice law in Texas because it concluded that he had not demonstrated the minimum standards for moral character required under Texas law.

Texas law provides that the Board may not deny licensure because of a deficiency in an applicant's moral character unless it finds (i) a clear and rational connection between (ii) a character trait of the applicant and (iii) the likelihood that the applicant would injure a client or obstruct the administration of justice. Texas law provides no meaningful standard for the determination of a character trait on which denial of licensure may be based, and it permits the Board to infer a connection between the negative

character trait and the likelihood of professional misconduct.

The Board found that Stevens had demonstrated "a marked disrespect for the law" and a "longstanding lack of financial responsibility" based on evidence that he had failed to file federal income tax returns for a number of years and had not arranged to satisfy three civil judgments for unpaid debts. Without more, Stevens' conduct underlying the identified character traits is not misconduct under Texas law.

The questions thus presented are:

1. Does the state law under which the Board denied Stevens' application, or the state law as applied to Stevens, violate Stevens' due process rights guaranteed by the United States Constitution?

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

Edward H. Stevens, III, Petitioner,

v.

The Board of Law Examiners of the State of Texas, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Petitioner, Edward H. Stevens, III, prays that a writ of certiorari issue to review the judgment of the Texas Supreme Court issued on January 5, 1994, in Board of Law Examiners of the State of Texas v. Edward H. Stevens, III, 868 S.W.2d 773 (Tex. 1994), which finally denied Stevens' application for a license to practice law in Texas.

OPINIONS BELOW

The Texas Supreme Court has issued an opinion in this case, which appears in Appendix A to this petition. Its judgment appears in Appendix B. The

opinion and judgment of the lower court, which was reversed by the Texas Supreme Court, appears in Appendix C. The two letter-orders of the Board of Law Examiners denying Stevens' application, and the Board's notice of the agency hearing, appear in Appendix D.

JURISDICTION

The judgment of the Texas Supreme Court was entered on January 5, 1994. The jurisdiction of this Court is invoked under 28 USC § 1257(a) and pursuant to S.Ct. Rule 10.1.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS INVOLVED

This case involves the first section of the Fourteenth Amendment to the United States Constitution, as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws (emphasis added).

This case involves certain provisions of Texas law, which follow in pertinent part:

Section 82.028 of the Texas Government Code:

* * *

(c) The [Board of Law Examiners] may not recommend denial of a license and the supreme court may not deny a license to an applicant because of a deficiency in the applicant's moral character or fitness unless:

> (1) The board finds a clear and rational connection between a character trait of the applicant and the likelihood that the applicant would injure a client or obstruct the administration of justice if the applicant were licensed to practice law . . . (emphasis added).

Rule II(b) of the Rules Governing Admission to the Bar of Texas of the Texas Supreme Court:

(b) Good moral character is a functional assessment of the character and fitness of a prospective lawyer. The purpose of requiring an applicant to possess good moral character is to exclude from the practice of law those persons possessing character traits that are likely to result in injury to future clients, in the obstruction of the administration of justice, or in a violation of the Code of

Professional Responsibility. These character traits usually involve either dishonesty or lack of trustworthiness in carrying out responsibilities. There may be other character traits that are relevant in the admission process, but such traits must have a rational connection with the applicant's present fitness or capacity to practice law and accordingly must relate to the State's legitimate interests in protecting prospective clients and the system of justice (emphasis added).

Rule 8.04 of the Texas Disciplinary Rules of Professional Conduct:[1]

(a) A lawyer shall not:

* * *

(2) commit a serious crime, or commit any other criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

* * *

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[1]When the Board issued its order and findings, the Texas Code of Professional Responsibility mentioned in the Texas Supreme Court's Rule II(b) was in effect. The Texas Disciplinary Rules of Professional Conduct became effective January 1, 1990. For the purposes of this case, the two are similar and citations are to the rules now in effect.

(b) As used in subsection (a)(2) of this Rule, "serious crime" means any felony involving moral turpitude, any misdemeanor involving theft, embezzlement, or fraudulent misappropriation of money or other property, or any attempt, conspiracy, or solicitation of another to commit any of the foregoing (emphasis added).

Comment 4 to Tex. Disciplinary R. Prof. Conduct:

4. Many kinds of illegal conduct reflect adversely on fitness to practice law. However, some kinds of offenses carry no such implication. Traditionally . . . the distinction has been drawn in terms of "serious crimes" and other offenses. . . . These Rules continue that distinction by making only those criminal offenses either amounting to "serious crimes" or having the salient characteristics of such crimes the subject of discipline. . . (emphasis added).

The applicable state law is reproduced in full in Appendix E.

STATEMENT OF THE CASE

Stevens is a licensed Mississippi attorney. Before his admission to the bar in 1969, he served as a member of the Mississippi House of Representatives and as an infantry (airborne) officer in Vietnam. After his admission, he was in

private practice until 1973, when he was employed as an attorney with the Corps of Engineers. Since January 1978, he has been in private practice of law in Picayune, Mississippi.

In August 1985, Stevens filed his application for admission to the Texas bar with the Board of Law Examiners (Board Exh. 1)[2]. He disclosed the existence of two unsatisfied judgments against him and a third that had been entered after the time of his original application (Board Exhs. 1, 3, Hearing Tr. 13). During its investigation, the Board received information from a judgment creditor that Stevens was not current in his obligations to the Internal Revenue Service ("IRS"). The information was obtained from responses

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[2]Parenthetical references are to the transcript or the exhibits offered at the administrative hearing on Stevens' application on February 22, 1988. Excerpts from the hearing transcript appear in Appendix F.

Stevens had made to post-judgment discovery (Hearing Tr. 16). Stevens supplemented his application in November 1987 and January 1988 (Board Exh. 3).

On January 20, 1988, the Board notified Stevens that it had set a hearing to determine whether he possessed good moral character (Appendix D). The letter identified the issues to be heard as "(1) whether . . . Stevens has failed to satisfy the judgments against him disclosed in his Application; (2) whether . . . Stevens has failed to satisfy any judgments against him not disclosed in his Application . . . ; and (3) whether . . . Stevens is current in his obligations to the Internal Revenue Service."

On February 22, 1988, the Board conducted the hearing on Stevens' application. Stevens was the only witness. He testified that the judgments against him were not

satisfied, but that he had never sought the protection of the bankruptcy laws (Hearing Tr. 27, Board Exh. 1). He said that he intended to pay the judgments (Hearing Tr. 27) and had not had the means to do so (Hearing Tr. 28) but would pay them out of an inheritance he would receive if he could not pay them before then (Hearing Tr. 54). The judgments totalled approximately $60,000 plus interest (Hearing Tr. 17-18). Stevens also testified that he had not disclosed the third judgment on his original application in August 1985 because he had not been sued at that time (Hearing Tr. 13-14), and the Board acknowledged that Stevens' attorney had disclosed it in April 1987 (Hearing Tr. 13), before Stevens' supplemental application in November 1987. Stevens had no other outstanding loans or claims against him (Hearing Tr. 29).

Stevens also testified that he had

not filed income tax returns from 1972 through 1986 (Hearing Tr. 22-23). He explained that he had given his records to a tax lawyer in 1984 (Hearing Tr. 44), who was working on his tax problem before the time he filed his original application with the Board (Hearing Tr. 26) in 1985. The tax lawyer filed the returns for seven prior years in 1986 (Hearing Tr. 22-23, 49). Stevens had satisfied his obligations, if untimely, in 1987 (Hearing Tr. 23, Applicant's Exh. 8). He had been paying interest and penalties as they were assessed, except for three tax years for which the IRS had overpenalized him, and he had agreed to pay the amounts owed for those years whenever his tax lawyer and the IRS arrived at them (Hearing Tr. 22-27, Applicant's Exhs. 8, 12). Stevens had paid the majority of his income taxes for the years in question through payroll deductions while at the Corps of

Engineers (Hearing Tr. 43). With the exception of two years after he left the Corps of Engineers, his unpaid taxes were less than $200 for each year (Hearing Tr. 47, Applicant's Exh. 8). He had not made much of a living as a lawyer and had to borrow money from his family (Hearing Tr. 30, 47).

There was no evidence that Stevens had intended to defraud the government or avoid paying taxes. The Board did not call any IRS agent as a witness or introduce a statement or deposition testimony of any IRS agent. There was no evidence that the IRS, the Mississippi bar or any other entity had ever prosecuted or even investigated Stevens. Stevens testified that in 1973 he had given his records to a certified public accountant who told him he had gotten an extension (Hearing Tr. 43). The accountant became reclusive and failed to prepare the returns (Id.).

Stevens wrote him to recover his records because he needed to file his returns but by then was another year behind (Id.) Stevens stated that he "was afraid to face up to the IRS" (Id.) He knew he had been paying his taxes but did not know what the IRS would do if he filed a late return (Hearing Tr. 43-44).

Stevens testified he had taken steps to rectify his tax problems on a purely voluntary basis, without any contact, letters or threats from the IRS (Hearing Tr. 47). His motivation at that time, independent of and before his application for admission to the Texas bar, was "to get straight with the IRS" (Hearing Tr. 46-47). He had not misrepresented or failed to disclose the status of his tax liability to the Board or to anyone else. The Board learned of his failure to file tax returns from a judgment creditor, who learned of it

from Stevens' straightforward response to post-judgment discovery (Hearing Tr. 16). The application Stevens filed with the Board did not ask for the disclosure of tax liability (Board Exhs. 1, 3).

In its investigation, the Board had received numerous credible reports of Stevens' moral character and ability as an attorney (Board Exh. 2, pp. 17-24). Stevens offered additional letters of recommendation at the hearing (Hearing Tr. 31-32, Applicant's Exhs. 1-3). Many were from prominent lawyers, including a member of the Mississippi Board of Bar Commissioners, the president of the state bar association, a district judge, a former member of the Mississippi legislature and a former member of the Federal Energy Regulatory Commission. He had practiced in state and federal trial and appellate courts (see, e.g., Hearing Tr. 39, Applicant's Exh. 9). There was no evidence that in his then-

nineteen years of law practice Stevens had ever injured a client, obstructed the administration of justice or engaged in any kind of professional misconduct, or even had a grievance filed against him with the Mississippi bar. To the contrary, Stevens had never been the subject of any investigations, sanctions or disciplinary actions relating to his judgments or tax liabilities by the Mississippi bar (Hearing Tr. 41).

On February 23, 1988, the Board notified Stevens that his application had been denied "based upon the [Board's] belief that he did not possess the present good moral character required for admission by the Rules Governing Admission to the Bar of Texas and by the Statutes."

On April 19, 1988, the Board notified Stevens of the findings on which its conclusion was based:

> (1) that Stevens has demonstrated a marked disrespect for the law as

shown by his failure to file federal income tax returns for a number of years and by his failure to arrange for satisfaction of three outstanding civil judgments based upon non-payment of various debts;

(2) that Stevens has demonstrated a long-standing lack of financial responsibility in his dealings with creditors and the IRS;

(3) that there is a clear and rational connection between Stevens' disrespect for the law and his lack of financial responsibility and the likelihood that he will injure a client, obstruct the administration of justice or fail to carry out his responsibilities if he is licensed to practice law, and;

(4) that Stevens does not possess the present good moral character as defined in Rule II(b), Rules Governing Admission to the Bar of Texas, and as required by TEX. GOV'T. CODE § 82.018 (1) and (2) (emphasis added)[3].

Stevens appealed to the district court of Travis County, Texas, which found that the Board's denial of his application was not supported by

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[3]The Board's letters of February 23 and April 19, 1988 serve as its order in this case and appear in Appendix D.

substantial evidence. The court of appeals affirmed the district court's judgment. The Texas Supreme Court reversed the judgments of the trial court and the appellate court and affirmed the Board's order.

In his supplemental brief to the Texas Supreme Court, submitted pursuant to TEX. R. APP. P. 136(d) in response to the Board's points of error, Stevens argued that the Board's order contravened this Court's analysis and decision in Rudolph Schware v. Board of Bar Examiners of the State of New Mexico, 353 U.S. 232, 1 L.Ed.2d 796, 77 S.Ct. 752 (1957). TEX. R. APP. P. 136(d). The Texas Supreme Court addressed the due process concerns raised by the Board's order, citing Schware and Konigsberg v. State Bar of California, 353 U.S. 252, 77 S.Ct. 722 (1957). 868 S.W.2d at 776-77.

REASONS FOR GRANTING THE WRIT

This case is important because the Texas law of attorney licensure contravenes the due process requirements of the Fourteenth Amendment to the U.S. Constitution. See, e.g., Schware, 353 U.S. at 238-39, 77 S.Ct. at 756. Either the Texas law is unconstitutional, or it is unconstitutional as applied to Stevens.

1. THE TEXAS LAW OF ATTORNEY LICENSURE LACKS MEANINGFUL STANDARDS FOR THE ASSIGNATION OF "CHARACTER TRAITS" AND PERMITS THE BOARD TO INFER, WITHOUT MORE, A CONNECTION BETWEEN A NEGATIVE CHARACTER TRAIT AND THE LIKELIHOOD OF PROFESSIONAL MISCONDUCT.

The practice of law is not a matter of the State's grace. Id., n. 5. The Court has recognized that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure."

In Re Application of Fre Le Poole Griffiths for Admission to the Bar, 413 U.S. 717, 720, 37 L.Ed.2d 910, 93 S.Ct. 2851, 2854 (1973). At the same time, the legitimate interests of the State are protected once an attorney is admitted to the bar because of the continuing scrutiny by the organized bar and the courts, which may impose discipline for unprofessional conduct, and the wide range of available post-admission sanctions, including judgments for contempt, criminal prosecution and disbarment. Id., 413 U.S. at 727, 93 S.Ct. at 2857; Schware, 353 U.S. at 246, 77 S.Ct. at 760, n. 20.

In balancing the State's interests with a bar applicant's constitutional rights, the Court has cautioned that "good moral character" is a "vague qualification, which is easily adapted to fit personal views and predilections [and] can be a dangerous instrument for

arbitrary and discriminatory denial of the right to practice law." Konigsberg, 353 U.S. at 263, 77 S.Ct. at 728.

Texas law grants authority to the Board and contemplates a procedure that exceeds State interests to the detriment of an applicant's rights. The appellate court below found Tex. Govt. Code § 82.028 "troublingly indefinite" and Rule II(b) of the Texas Supreme Court to add "little precision" to the Board's task of evaluating moral character. Board of Law Examiners v. Stevens, 850 S.W.2d 558, 560 (Tex. App.--Austin 1992) reversed 868 S.W.2d 773 (Tex. 1994). Together, the statute and the rule permit the Board to exclude applicants with character traits, generally involving dishonesty or lack of trustworthiness, which have a rational connection with the likelihood that the applicant would injure future clients, obstruct the administration of justice,

or violate the State Bar rules. The applicable State Bar rule and related commentary describe lawyer misconduct, including the commission of a serious crime or other criminal act reflecting on a lawyer's honesty, trustworthiness or fitness, and conduct involving dishonesty, fraud, deceit or misrepresentation. Tex. Disciplinary R. Prof. Conduct 8.04, Comment 4.

Texas law is unconstitutional because attorney licensure depends on a connection between the practice of law and a character trait the Board may assign to an applicant but not on a connection between the practice of law and the applicant's conduct that underlies the Board's assignation. The Board is required to find only that there is a connection between an assigned character trait and the likelihood that the applicant will engage in the prohibited conduct; it

need not find a connection between the underlying conduct and the possibility of lawyer misconduct. Board of Law Examiners v. Stevens, 868 S.W.2d at 778; but see 850 S.W.2d at 562. Although there must be "substantial evidence"[4] to support an assigned character trait, there need be no evidence at all to make the required connection between the character trait and the likelihood of professional misconduct. The connection need only be rational.

The practical effect of Texas law is

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[4]"Substantial evidence" for purposes of judicial review does not mean a preponderance of the evidence or any higher standard. The term has been defined as not meaning a large or considerable amount of evidence but rather "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Pierce v. Underwood, 487 U.S. 552, 564-5, 101 L.Ed.2d 490, 108 S.Ct. 2541, 2550 (1988); Texas State Board of Dental Examiners v. Sizemore, 759 S.W.2d 114, 116 (Tex. 1988) (there is substantial evidence when "the evidence as a whole is such that reasonable minds could have reached the conclusion that the agency must have reached in order to justify its action").

to grant the Board unreasonably broad discretion that goes beyond protecting the State's legitimate interests. It permits the Board to deny licensure merely by identifying in an applicant virtually any negative character trait, which is deemed ipso facto to have a rational connection with the likelihood that the applicant will engage in professional misconduct. Thus the Board may deny licensure solely on evidence of a negative character trait. If it finds that an applicant has a particular character trait, it may then infer a connection between the assigned character trait and a likelihood that the applicant might engage in professional misconduct, and finally conclude that the applicant does not meet the minimum standards for moral character to be admitted to the bar. The rational link with the future practice of law is between the Board's

assignation, when it should be with the applicant's conduct. Schware, 353 U.S. at 239, 77 S.Ct. at 756.

The arbitrary nature of the standards governing the Board's exercise of discretion is not hard to illustrate. Hypothetically, outstanding library fines, leash law citations or parking tickets could be basic facts constituting substantial evidence that an applicant is disrespectful of the law and financially irresponsible. At the same time, those facts could also be substantial evidence that the applicant had different character traits, including hypothetically a love of books or dogs or a tendency to procrastinate. Further, the record could contain facts showing that the applicant was wholly devoid of a bad motive or an evil intent in incurring or failing to pay his penalties. Even so, the applicant would be barred from licensure solely on the

factual basis for the assignation of the negative character traits, without more, just as if he had engaged in serious criminal conduct or other crimes with the salient characteristics of serious crimes, or some form of dishonesty, fraud, deceit or misrepresentation.

Additionally, the character trait of disrespect for the law as a classification on which to deny licensure is unreasonably broad. It could encompass virtually any infraction, including use of controlled substances, failure to pay a domestic servant's social security tax, or failure to obtain a new automobile license tag or safety inspection sticker, regardless of any mitigating circumstance. The classification has the capacity to criminalize past behavior without assuming the burden of proof for doing so and to deny licensure based on inferences about the

classification. See Schware, 353 U.S. at 246, 77 S.Ct. at 760 (evil purposes cannot automatically be inferred from classification).

In Schware, the Court stated that any qualification for admission to the bar must have a rational connection with the applicant's fitness or capacity to practice law. Id., 353 U.S. at 238, 77 S.Ct. at 756. There the board of law examiners denied Schware admission to the bar because it had concluded that he had not shown good moral character. As in the instant case, the board called no witnesses, no one testified that Schware was not of good character, and the board admitted that he was otherwise qualified to take the bar examination. Id., 353 U.S. at 239-40, 77 S.Ct. at 756-57. The board's conclusion was based on Schware's past use of aliases, his past connections with the communist party, and his record of arrests. Id., 353

U.S. at 234, 77 S.Ct. at 754. However, other record facts were that Schware had used aliases to avoid anti-Jewish prejudice, had never been charged or tried as a result of any arrest, and that his membership in the communist party in the 1930s had not been unlawful. Id., 353 U.S. at 240-46, 77 S.Ct. at 757-60. The Court did not accept the board's inference that a person who had done things it found objectionable necessarily lacks the moral character required to practice law. Instead, it examined the entire record to determine whether Schware's due process rights had been violated. Because of the mitigating circumstances, the Court found that there was no rational connection between Schware's past conduct as characterized by the board and the conclusion that Schware was morally unfit to practice law. Id. 353 U.S. at 246-47, 77 S.Ct. at 760.

Schware should govern this case when, under Texas law, the only decisional link to an applicant's future law practice is the Board's assignation of a character trait in the applicant rather than the applicant's past conduct. As in Schware, how the Board may characterize an applicant is a less probative and rational measure of an applicant's future conduct than the applicant's own past conduct.

2. TEXAS LAW, AS APPLIED, VIOLATES STEVENS' CONSTITUTIONAL RIGHTS OF DUE PROCESS.

Even if Texas law of attorney licensure is not unconstitutional or does not authorize an unconstitutional procedure, it has violated Stevens' rights as applied in this case.

The Board's order identifies the only facts underlying the denial of Stevens' application as his failure to file tax returns for fourteen years and to arrange for the satisfaction of his

judgments. Based on those facts, the Board found that Stevens had shown a disrespect for the law and a lack of financial responsibility. From the assigned character traits, the Board inferred that there was a likelihood that Stevens would engage in professional misconduct and concluded that he did not possess the present good moral character required by Texas law.

Stevens' failure to file tax returns is not a "serious crime" under subsections (a)(2) and (b) of Tex. Disciplinary R. Prof. Conduct 8.04 because, even if "willful," it would at most be a misdemeanor, 26 U.S.C.S. § 7203, and in any case Stevens' conduct does not involve theft, embezzlement or fraudulent misappropriation of money. See, e.g., State v. McVicker, 553 S.W.2d 820 (Tex. Civ. App.--Beaumont 1977, writ ref'd n.r.e.) (willful failure to file income tax return is not a "serious

crime" and does not require compulsory disbarment upon conviction). It is not an "other criminal act" under the rule because it lacks the salient characteristics of a "serious crime," which at the least include criminal intent. See, Tex. Disciplinary R. Prof. Conduct 8.04, cmt. 4. Even if the Board or the Texas Supreme Court concluded that there was evidence that Stevens willfully chose to delay filing his returns, 868 S.W.2d at 780, there was no evidence that Stevens had the necessary intent for a tax crime. "Willfulness" in the context of tax crimes requires proof of "bad faith or evil intent" or "evil motive and want of justification in view of all the financial circumstances of the taxpayer." United States v. Bishop, 412 U.S. 346, 360, 36 L.Ed.2d 941, 93 S.Ct. 2008, 2017 (1973). "Willfulness" requires an element of mens rea. Id., 412 U.S. at 361, 93 S.Ct.

at 2017; see also In Re Chervin, 586 N.Y.S.2d 946, 950 (1952), ("circumstances warrant the imposition of the most severe sanction" where "the non-filings for which [Chervin] was convicted were motivated by deliberate venality and dishonesty . . .")(emphasis theirs).

In this case, the circumstances surrounding Stevens' failure to file his tax returns and the fact that he was not investigated or convicted show that he would not have been treated nearly so severely as he was by the Board had he already been licensed in Texas. Reported cases in other states show that the penalties resulting from disciplinary actions taken against lawyers after they are convicted for failure to file tax returns are invariably based on consideration of the circumstances of their conduct. Id.; see generally, Federal Income Tax

Conviction as Constituting Nonprofessional Misconduct Warranting Disciplinary Action Against Attorney, 63 ALR3d 519.[5] There is a range of penalties imposed on licensed lawyers in other states, and the particular penalties depend on the circumstances. Thus, although a conviction for willful

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[5]Of the 100-plus cited cases discussed or indicating the type of penalty imposed on licensed lawyers following a conviction (exclusive of other cases cited as having the same effect or cases not identifying the type of disciplinary action), 30 resulted in censure; 2 resulted in probation; 48 resulted in suspensions ranging from thirty days to three years, of which 18 were for six months; 1 resulted in an order that the attorney pay costs in lieu of suspension; 22 resulted in indefinite suspension or suspension until further order of the court; 1 resulted in disbarment; and 2 resulted in dismissal of the petitions seeking discipline. The cases resulting in dismissal turned on the absence of an attempt to evade payment of taxes or to understate the amount due, the absence of any fraud or venality, filing returns and paying taxes before indictment, and the attorney's uniformly good reputation during his years of practice. See In Re Anonymous No. 1, 357 N.Y.S.2d 505 (1974); In Re Anonymous No. 2, 357 N.Y.S.2d 506 (1974).

failure to file an income tax return does not require proof of intent to defraud the government, Stevens' motives are relevant nonetheless because they show the absence of the necessary mens rea in the criminal forum as well as the absence of the kind of circumstances found in disciplinary actions resulting in disbarment.

Without more, Stevens' failure to file tax returns is also not a violation of subsection (a)(3) of Rule 8.04. Dishonesty, fraud, deceit or misrepresentation all require a bad intent.

Additionally, Stevens' failure to satisfy his judgment debts is not a violation of subsection (a)(3) of Rule 8.04 absent the intent that underlies dishonesty, fraud, deceit or misrepresentation. Even a desire to avoid debts by means of bankruptcy at the very time a lawyer has the means to

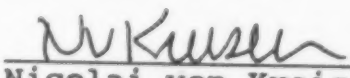
pay them is not, by itself, a basis to prevent admission to the bar. Florida Board of Bar Examiners Re Groot, 365 So.2d 164 (Fla. 1978).

Finally, Stevens is licensed to practice law in Mississippi and in a number of federal courts. Under Texas law, as applied, he does not have sufficiently good moral character, even though he has met similar tests in other jurisdictions. All such jurisdictions share the same interest in guarding against professional misconduct. The Board's classification of Stevens as unfit to practice law based on its assignation of the character traits of disrespect for the law and financial irresponsibility does not meet the constitutional standards articulated in or underlying Schware, Konigsberg and Griffiths in the face of Stevens' good standing as a lawyer in other jurisdictions.

CONCLUSION

For the foregoing reasons, Stevens respectfully prays that his petition for a writ of certiorari be granted.

Respectfully submitted,



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ATTORNEYS FOR PETITIONER
EDWARD H. STEVENS, III

APPENDIX A

IN THE SUPREME COURT OF TEXAS

No. D-3694

THE BOARD OF LAW EXAMINERS
OF THE STATE OF TEXAS, PETITIONER

v.

EDWARD H. STEVENS, III, RESPONDENT

Argued November 4, 1993

ON APPLICATION FOR WRIT OF ERROR TO THE
COURT OF APPEALS FOR THE
THIRD DISTRICT OF TEXAS

JUSTICE CORNYN delivered the opinion of the Court, in which all JUSTICES join.

This controversy between an applicant for admission to the Texas Bar and the Board of Law Examiners ("Board" or "BLE") requires us to interpret the minimum standards for moral character and fitness contained in the TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT, and to clarify the process by which courts should review Board

decisions. We hold that the court of appeals misinterpreted the Disciplinary Rules and misapplied the standard of review. Accordingly, we reverse the judgment of the court of appeals and affirm the Board's decision.

I.

Edward H. Stevens, III, who was licensed to practice law in Mississippi in 1969, applied in August 1985 to join the Texas Bar. The bar application required Stevens to disclose whether he had "any debts, including student loans, which are more than 90 days past due." Although Stevens had failed to file a single federal income tax return since 1972, would not file one in 1986, and owed taxes, penalties, and interest to the Internal Revenue Service, he did not disclose this information on his bar application. Stevens did disclose two unsatisfied judgments. While his application was pending, a third

judgment was entered against him on account of an overdue debt. The Board nevertheless learned of Stevens's failure to file tax returns, held a hearing, and decided in 1988 that Stevens did not possess the moral character and fitness necessary to qualify for membership in the Texas Bar. Stevens sought judicial review of the Board's decision in a Travis County district court, which held that the Board's decision was not supported by "substantial evidence,"[1] and remanded the case to the Board for further proceedings. The court of appeals affirmed. 850 S.W.2d 558.

At the hearing before the Board, Stevens testified that he did not have

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[1]Rule XV(i)(5) of the RULES GOVERNING ADMISSION TO THE BAR OF TEXAS says, "The court shall determine... whether or not the Board's decision is reasonably supported by substantial evidence." At the time of the hearing, the same language was found in Rule XI(m).

the means to satisfy the judgments against him, but he anticipated that he would pay these debts out of any inheritance he would receive from his mother.

Stevens also disclosed that the only income tax he had paid in the fourteen years from 1972 to 1986 was that withheld by his employer for the five years he worked for the Army Corps of Engineers. He was in private practice throughout the remainder of this period, but paid no income tax and filed no returns. Stevens asserts that he "did not intend" to defraud the government, but claimed that an accountant to whom he had given his tax documents in 1973 failed to prepare his returns. By the time Stevens recovered his tax-related papers, he was two years behind, and "afraid" to file the returns late.

In 1986, about the time he filed his bar application, Stevens acknowledged

that there would be "a day of reckoning." By the time the Board held its hearing in 1988, Stevens had filed a late return for 1986 and returns for the seven previous years. He expressed his desire "to get straight with the IRS," and testified that he had filed his returns before he was contacted by the IRS. He presented evidence that he paid his taxes for seven of the fourteen years, but that he continues to dispute the amount of interest and penalties he owes for three of the seven years. The federal government has not prosecuted him.

The Board informed Stevens of its adverse decision by letter, in which it also explained its decision.[2] The Board

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[2]After considering all of the evidence and testimony, the Board voted that EDWARD H. STEVENS, III['s] application be denied because he lacks the present good moral character required for admission by the Rules Governing Admission to the Bar of Texas and by the Statutes. In support of this decision, the Board found:

concluded that Stevens does not possess the necessary good moral character on two grounds--that he "has demonstrated a marked disrespect for the law" and he "has demonstrated a longstanding lack of financial responsibility." The trial court held that this decision was not

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(1) that EDWARD H. STEVENS, III, has demonstrated a marked disrespect for the law as shown by his failure to file federal income tax returns for a number of years and by his failure to arrange for satisfaction of three (3) outstanding civil judgments based upon nonpayment of various debts;
(2) that EDWARD H. STEVENS, III, has demonstrated a longstanding lack of financial responsibility in his dealings with creditors and the Internal Revenue Service;
(3) that there is a clear and rational connection between the applicant's disrespect for the law and his lack of financial responsibility on the one hand and the likelihood that he will injure a client, obstruct the administration of justice or fail to carry out his responsibilities if he is licensed to practice law on the other, and;
(4) that EDWARD H. STEVENS, III, does not possess the present good moral character as defined in Rule II(b) of the Rules Governing Admission to the Bar of Texas and as required by Section 82.018 [sic.] (1) and (2) of the Texas Government Code.

supported by "substantial evidence," and the court of appeals affirmed, stating:

> We sympathize with the difficulty the Board faces in assessing such an ambiguous quality as "good moral character." On the state of the record presented to the trial court, however, we hold Stevens met his burden of demonstrating that the Board did not reasonably conclude his misconduct would probably result in injury to future clients, the obstruction of justice, or a disciplinary violation.

850 S.W.2d at 564.

II.

Justice Frankfurter once observed that "all the interests of [humanity] that are comprised under the constitutional guarantees given to 'life, liberty and property' are in the professional keeping of lawyers." Schware v. Board of Bar Exams, 353 U.S. 232, 247 (1957)(Frankfurter, J., concurring).

> A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. Lawyers, as guardians of the law, play a vital

> role in the preservation of society. * * * A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.

TEX. DISCIPLINARY R. PROF. CONDUCT, pmbl. para. 1. (1989), reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (Vernon Supp. 1994)(State Bar Rules art. X § 9).[3] By the nature of their profession, lawyers occupy a position of public trust and confidence, and have a

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[3]When the BLE reached its decision concerning Stevens's application, the Texas Code of Professional Responsibility, see State Bar Rules, art. X, § 9, TEX. GOV'T CODE ANN. tit. 2, subtit. G app.(Vernon 1988)(repealed Jan. 1, 1990), was still in effect. The TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT became effective January 1, 1990, by order of the Texas Supreme Court dated October 17, 1989.

Although the TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT and the Code of Professional Responsibility differ in some respects, there is no difference between them that would affect the outcome of this case. Therefore, we will discuss Stevens's ethical duties in the context of the current disciplinary rules, but cite to the Code of Professional Responsibility as appropriate.

concomitant obligation to refrain from misbehavior and to carry out their professional duties with reasonable skill and personal integrity.

It would be small comfort to the public if the only ethical standard for admission to the Texas Bar were an absence of convictions involving serious crimes and crimes of moral turpitude. Rather than mere absence of gross misbehavior, bar admission affirmatively requires "good moral character" and "fitness" to practice law. RULES GOVERNING ADMISSION TO THE BAR OF TEXAS IV(a)(1992). TEXAS DISCIPLINARY R. PROF. CONDUCT terminology (1989) expressly defines "fitness" as "those qualities . . . that enable a person to discharge a lawyer's responsibilities to clients in conformity with [these rules]. Normally a lack of fitness is indicated most clearly by a persistent inability to discharge, or unreliability in carrying

out, significant obligations." See also, RULES GOVERNING ADMISSION TO THE BAR OF TEXAS IV(b)(1992)(purpose of assessment of good moral character is "to exclude from the practice of law those persons possessing character traits . . . [that] usually involve either dishonesty or lack of trustworthiness in carrying out responsibilities").

The Board of Law Examiners supervises bar admissions and thereby plays a key role in maintaining the integrity and character of the Texas Bar. By statute, law examiners must be licensed to practice law in Texas and have practiced law or served as a judge for at least ten years. TEX. GOV'T CODE ANN. § 82.001 (Vernon 1988); TEX. CONST. art. 5, § 2. This court has vested the Board with considerable discretion when applying promulgated admission standards to evaluate applicants.

We recognize the difficulty inherent in assessing "good moral character" to practice law. As the court of appeals emphasized, "good moral character," standing alone, is "easily adapted to fit personal views and predilections, [and] can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law." 850 S.W.2d at 560 (quoting Konigsberg v. State Bar, 353 U.S. 252, 263 (1967). However, the Board of Law Examiners is not without guidance in evaluating "good moral character." TEXAS GOV'T CODE ANN. § 82.028(c)(Vernon 1988), which authorizes the Board to conduct investigations, expressly circumscribes the power of the Board in making this determination:

> The board may not recommend denial of a license and the supreme court may not deny a license to an applicant because of a deficiency in the applicant's moral character or fitness unless:
>
> (1) the board finds a clear and rational connection between a character trait of the

> applicant and the likelihood that the applicant would injure a client or obstruct the administration of justice if the applicant were licensed to practice law. . . .

TEX. GOV'T CODE ANN. § 82.028(c)(Vernon 1988). The RULES GOVERNING ADMISSION TO THE BAR OF TEXAS, promulgated under TEX. GOV'T CODE § 82.022(b)(Vernon 1988), have "the same effect as statutes," see State Bar v. Wolfe, 801 S.W.2d 202, 203 (Tex. App.--Houston [1st Dist.] 1990, no writ), and provide further guidance:

> Good moral character is a functional assessment of character and fitness of a prospective lawyer. The purpose of requiring an Applicant to possess present good moral character is to exclude from the practice of law those persons possessing character traits that are likely to result in injury to future client, in the obstruction of the administration of justice, or in a violation of the [Disciplinary Rules]. These character traits usually involve either dishonesty or lack of trustworthiness in carrying out responsibilities. There may be other character traits that are relevant in the admission process, but such traits must have a rational connection with the

> Applicant's present fitness or capacity to practice law and accordingly must relate to the legitimate interests of Texas in protecting prospective clients and in safeguarding the system of justice within Texas.

RULES GOVERNING ADMISSION TO THE BAR OF TEXAS IV(b)[4](1992)(emphasis added). These rules make it clear that the Board must be guided in its assessment by (1) the TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT and (2) legitimate state interests in protecting prospective clients and the Texas justice system. Because the Board must find a "clear and rational connection" between the applicant's character trait and the threatened harm, TEX. GOV'T CODE § 82.028(c)(Vernon 1988), it is not permitted to make arbitrary or unseasoned judgments. See, e.g., Schware v. Board of Bar Exams., 353 U.S. 232, 239 (1957).

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[4]Formerly rule II(b).

Although it may initially seem appealing, as the court of appeals suggested, to generate detailed lists of actions that will result in discipline for an attorney or disqualification for a bar applicant, such a list is both impracticable and undesirable. The Preamble to the TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT, based on the AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT, recognizes this principle:

> In the nature of law practice, conflicting responsibilities are encountered. . . . The Texas Disciplinary Rules . . . prescribe terms for resolving such tensions which the lawyer can rely for guidance in resolving such issues through the exercise of sensitive professional and moral judgment. * * * The Texas Disciplinary Rules . . . are rules of reason. [They] define proper conduct for purposes of professional discipline. * * * The rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general . . . The rules and Comments do not,

> however, exhaust the moral and ethical considerations that should guide a lawyer, for no worthwhile human activity can be completely defined by legal rules. * * * These rules make no attempt to prescribe either disciplinary procedures or penalties for violation of a rule.

TEX. DISCIPLINARY R. PROF. CONDUCT, pmbl. paras. 7, 10-11, 14 (1989). The nature and complexity of law practice preclude an exhaustive list of actions warranting discipline and the sanctions for each. Likewise, the diversity of bar applicants renders advance preparation of an exhaustive list of disqualifying factors problematic. On balance, we conclude that the TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT provide reasonably comprehensive standards to guide the Board's discretion.

III.

When reviewing a Board decision, courts are bound to apply the "substantial evidence" standard. RULES

GOVERNING ADMISSION TO THE BAR OF TEXAS XV(i)(4),(5)(1992). Although the Administrative Procedure and Texas Register Act ("APTRA"), 73rd Leg., R.S., ch. 268, § 1, 1993 Tex. Sess. Law Serv. 587 (Vernon)(to be codified as TEX. GOV'T CODE ANN. §§ 2001.001-2001.902), technically, does not govern Board procedures, the APTRA sections addressing the scope of judicial review under the substantial evidence rule are instructive. APTRA § 2001.174 states that a trial court applying the substantial evidence rule "may not substitute its judgment for the judgment of the state agency on the weight of the evidence on questions committed to agency discretion." In relevant part, APTRA § 2001.174 also provides that a trial court shall reverse or remand an agency decision only if "the administrative findings, inferences, conclusions, or decision are . . . (E)

not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or (F) arbitrary or capricious or characterized by abuse of discretion . . ." APTRA § 2001.901, and Rule XV(i)(6) of the Admission Rules, governing appeals from the trial court, use virtually identical language.

Because the determination of a candidate's character and fitness is a decision "committed to [Board] discretion," neither the trial court nor the appellate courts may "substitute [their] judgment" for that of the Board. See APTRA § 2001.174; Railroad Comm'n v. Pend Oreille Oil & Gas Co., 817 S.W.2d 36, 41 (Tex. 1991). Our duty, like that of the courts below, in reviewing the BLE's decision is to determine whether substantial evidence supports it. If reasonable minds could have reached the conclusion that the Board reached on the

record presented, then we must uphold its decision. See State Bd. of Dental Exams. v. Sizemore, 759 S.W.2d 114, 116 (Tex. 1988); Dotson v.State Bd. of Medical Exams., 612 S.W.2d 921, 922 (Tex. 1981).

IV.

A

After reviewing Stevens's application and other evidence, the Board identified two negative character traits that are "likely to result in injury to future clients . . . or in a violation of the [Disciplinary Rules]," RULES GOVERNING ADMISSION TO THE BAR OF TEXAS IV(b) (1992), namely, that Sevens "has demonstrated a marked disrespect for the law," and that he "has demonstrated a longstanding lack of financial responsibility."[5] So long as substantial

[5]The record also shows that Stevens, fully aware of his obligations to the Internal Revenue Service and three judgment creditors, did not fully disclose his debts on his Texas Bar

evidence supports the Board's findings, its decision meets the statutory standard. This "substantial evidence" standard of review applies both to the Board's identification of the applicant's character traits and to its finding that the applicant's character traits are likely to cause future injuries to clients or violations of the Disciplinary Rules.

The court of appeals, in determining whether sufficient evidence supported the conclusions of the Board, stated, "We must uphold the Board's decision if it is supported by substantial evidence that Stevens's [past] misconduct would probably result in (1) injury to future clients, . . . or (3) a violation of the

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application. However, the Board did not list nondisclosure or a violation of TEX. DISCIPLINARY R. PROF. CONDUCT 8.01 (1989) among its reasons for denying Stevens admission to practice. At the time Stevens applied, DR 1-101(A) of the Texas Code of Professional Responsibility was in effect, but was no less clear about his obligations.

Disciplinary Rules." 850 S.W.2d at 562. This statement, however, mischaracterizes the legal standard by which Stevens's conduct must be judged. The statutory standard requires "a clear and rational connection between a character trait of the applicant and the likelihood that the candidate would injure a client [or violate the Disciplinary Rules]." TEX. GOV'T CODE § 82.028(c)(1)(Vernon 1988)(emphasis added). Rather than determining whether particular past misconduct will be repeated or will directly result in future injury or disciplinary violations, the statute requires the Board to determine whether those acts show that an applicant has a negative character trait that is likely to cause the applicant to injure a client or violate the disciplinary rules. Such a character trait "usually involve[s] either dishonesty or lack of

trustworthiness in carrying out responsibilities," but "other character traits [may be] relevant." RULES GOVERNING ADMISSION TO THE BAR OF TEXAS IV(b) (1992).

B

The court of appeals further deemed it necessary to determine whether Stevens's failure to file tax returns supported the conclusion that he "will probably violate the new Disciplinary Rules." 850 S.W.2d at 563. The court held: "Standing alone, Stevens's failure to file federal income tax returns would not seem to constitute a serious crime," or otherwise to violate TEX. DISCIPLINARY R. PROF. CONDUCT 8.04(a)(2)(1989). 580 S.W.2d at 564. We need not determine here whether the failure to file tax returns constitutes a "serious crime." However, we hold that the court of appeals misconstrued TEX.

DISCIPLINARY R. PROF. CONDUCT 8.04 (1989).

TEXAS DISCIPLINARY R. PROF. CONDUCT 8.04 (1989) is based on Rule 8.4 of the AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT ("ABA MODEL RULES"), which states, in relevant part:

> It is professional misconduct for a lawyer to: . . .
>
> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; . . .

However, TEX. DISCIPLINARY R. PROF. CONDUCT 8.04 (1989) contains materially different language (italics [underlines] indicate Texas changes to the ABA MODEL RULES):[6]

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[6]The Texas rules are intended to correspond with relevant sections of Article X of the TEXAS STATE BAR RULES. TEX. DISCIPLINARY R. PROF. CONDUCT 8.04 cmt. 2. Since May 1, 1992, however, the TEXAS RULES OF DISCIPLINARY PROCEDURE

(a) A lawyer shall not: . . .

> (2) commit a serious crime, or commit any other criminal act that reflects adversely on the lawyer's . . . fitness as a lawyer in other respects;
>
> (3) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; . . .

(b) As used in subsection (a)(2) of this Rule, "serious crime" means any felony involving moral turpitude, any misdemeanor involving theft, embezzlement, or fraudulent misappropriation of money or other property, or any attempt, conspiracy, or solicitation of another to commit any of the foregoing.

The comments to both Texas Rule 8.04 and ABA MODEL RULE 8.4 define "professional misconduct" to include criminal acts, serious or not, that "reflect[] adversely on the lawyer's . . . fitness [to practice law]." Comment 5 to TEX. DISCIPLINARY R. PROF. CONDUCT 8.04,

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have superseded the relevant sections of Article X.

further explains the conduct subject to discipline under the Texas rule:

> Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for those offenses that indicate lack of those characteristics relevant to his fitness for the practice of law, as "fitness" is defined in these rules. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation that legitimately could call a lawyer's overall fitness to practice into question.

TEX. DISCIPLINARY R. PROF. CONDUCT 8.04 cmt. 5 (1989)(italics [double underlines] indicate Texas changes to ABA MODEL RULE 8.4 cmt. 1; underline indicates emphasis added). Texas amended the comments to ABA MODEL RULE 8.4 substantially in the process of harmonizing Rule 8.04 with Texas disciplinary procedure. Comments 6 and 7 to TEX. DISCIPLINARY R. PROF. CONDUCT 8.04 closely track comments 2 and 3 to ABA MODEL RULE 8.4, while Comments 1, 2, and 3 to TEX. DISCIPLINARY R. PROF.

CONDUCT 8.04 describe how portions of Rule 8.04 correspond to sections of the former State Bar Rules. Much of the language from ABA MODEL RULE 8.4 cmt. 1 is contained TEX. DISCIPLINARY R. PROF. CONDUCT 8.04 cmts. 4, 5 (1989). However, all specific examples of "professional misconduct" from ABA MODEL RULE 8.4 cmt. 1 are conspicuously absent from TEX. DISCIPLINARY R. PROF. CONDUCT 8.04 cmts. 4, 5 (1989), including the following:

> Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return.

ABA MODEL RULE 8.4 cmt. 1 (emphasis added). The Texas Rules do not indicate a reason for the omission of specific examples, and we do not believe this omission should be construed to suggest that these offenses are not subject to discipline. In our view, there is no more reason to assign significance to the omission of willful failure to file

a tax return than there is to the omission of fraud or breach of trust. Because Texas defines criminal misconduct as "a serious crime, or . . . any other criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects," willful failure to file a tax return constitutes attorney misconduct subject to discipline. TEX. DISCIPLINARY R. PROF. CONDUCT 8.04(a)(2)(1989)(emphasis supplied).

The court of appeals distinguished this case from In re Chervin, 586 N.Y.S.2d 946 (N.Y. App. Div. 1992) (disbarment required as a matter of law for lawyer's failure to file returns for twenty years), on the ground that the New York court found Chervin was motivated by "deliberate greed and dishonesty," while Stevens testified that he was "afraid" of the IRS and "did not intend" to defraud the government.

We find this reasoning unpersuasive for several reasons. First, the court of appeals must not substitute its judgment for that of the Board with regard to factual determinations. State Banking Bd. v. Allied Bank Marble Falls, 748 S.W.2d 447 (Tex. 1988); Sizemore, 759 S.W.2d at 116.

Second, the crime of willful failure to file an income tax return does not require proof of intent to defraud the government. See, e.g., Sansone v. United States, 380 U.S. 343 (1965). Willful failure to file an income tax return, 26 U.S.C. § 7203 (Supp. 1993), is a misdemeanor, distinguished from the felony of willful attempt to evade or defeat a tax. 26 U.S.C. § 7201 (1988); United States v. Ming, 466 F.2d 1000, 1004 (7th Cir.), cert. denied, 409 U.S. 915, reh'g denied, 409 U.S. 1051 (1972). Moreover, willful failure to file a tax return is generally recognized as a

crime of moral turpitude in disbarment proceedings, In re Pohlman, 248 N.W.2d 833, 835 (N.D. 1976); State Bd. of Law Exam. v. Holland, 494 P.2d 196, 197 (Wyo. 1972); In re McKechnie, 330 P.2d 727, 728 (Or. 1958); Attorney Grievance Comm. v. Barnes, 408 A.2d 719, 723 (Md. 1979); State v. Fitzgerald, 85 N.W.2d 323, 327 (Neb. 1957); In re Norrid, 670 P.2d 580, 580 (N.M. 1983), or as otherwise warranting discipline. In re Rohan, 578 P.2d 102, 104 (Cal. 1978); People v. Borchard, 825 P.2d 999, 100 (Colo. 1992). There is no doubt that Stevens knew of his obligation to file his tax returns in 1972, that he waited for two years to retrieve his tax-related papers from his accountant, and that he did not file returns for fourteen years. The Board could reasonably conclude that Stevens, with knowledge of his obligations, willfully chose to delay filing his returns.

Stevens's motives are irrelevant in determining whether he willfully failed to file a tax return.

Third, even assuming that Stevens was motivated by "fear" rather than "greed," his failure to file should not be excused. Debilitating fear of any tribunal is not a laudable trait for a lawyer. In the zealous representation of clients, the Disciplinary Rules sometimes require lawyers to act with extraordinary courage despite opposing state action or public opinion. Finally, even if Stevens's behavior were not criminal,[7] a fourteen-year failure to

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[7]The BLE determines whether an applicant has engaged in criminal conduct for different purposes, and according to different evidentiary standards, than prosecutors or courts. Although an acquittal in court would be highly probative evidence before the BLE, the BLE must still exercise independent judgment in applying the TEX. DISCIPLINARY R. OF PROF. CONDUCT and the RULES GOVERNING ADMISSION TO THE BAR OF TEXAS to give effect to the legitimate state interests of "protecting prospective clients and safeguarding the system of justice

file income tax returns constitutes dishonest conduct that would violate TEX. DISCIPLINARY R. PROF. CONDUCT 8.04(a)(3)(1989).

C

Although the determination that Stevens has engaged in past misconduct is probative of his character and fitness to practice law in Texas, it is not dispositive. There must additionally be "substantial evidence" of a "clear and rational connection between a character trait of the applicant and the likelihood that the applicant would injure a client [or violate the DISCIPLINARY RULES] if the applicant were licensed to practice law . . ." TEX. GOV'T CODE § 82.028(c); RULES GOVERNING ADMISSION TO THE BAR OF TEXAS IV(b), XV(i)(5)(1992). The most salient character traits "involve either

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within Texas." RULES GOVERNING ADMISSION TO THE BAR OF TEXAS IV(b)(1992).

dishonesty or lack of trustworthiness in carrying our responsibilities." RULES GOVERNING ADMISSION TO THE BAR OF TEXAS IV(b)(1992).

The record contains substantial evidence in support of the Board's conclusion that Stevens "has demonstrated a marked disrespect for the law." As a licensed attorney, fully aware of his obligation to file and pay taxes, Stevens failed for fourteen years to carry out one of the most basic and universal duties of citizenship. We hold that the substantial evidence that he repeatedly disregarded his legal duties and the standards of professional conduct supports the Board's conclusion.

Fourteen years of failure to pay taxes and the failure to satisfy three overdue judgment debts also constitute substantial evidence that Stevens "has demonstrated a longstanding lack of financial responsibility." On this

point, the court below agrees. 850 S.W.2d at 564. This is, furthermore, substantial evidence that Stevens suffers from a "persistent inability to discharge, or unreliability in carrying out, significant obligations." TEX. DISCIPLINARY R. PROF. CONDUCT terminology (1989)(definition of "fitness").

Because an attorney must act as a counsellor and advisor, see TEX. DISCIPLINARY R. PROF. CONDUCT 2.01, 1.01, 1.02 (1989), and is frequently entrusted with responsibility for clients' assets and affairs, see TEX. DISCIPLINARY R. PROF. CONDUCT 1.14 (1989), it is apparent to us that there is a "clear and rational connection" between disrespect for the law and financial irresponsibility on the one hand, and "the likelihood that [an] applicant would injure a client," on the other. TEX. GOV'T CODE ANN. § 82.028

(c)(1)(Vernon 1988). "Substantial evidence" review of the "clear and rational connection" issue presents a mixed question of act and law, and requires case-by-case examination of the facts rather than blanket rules barring from practice all applicants, for example, who possess indicia of "financial irresponsibility." However, given the evidence of Stevens's negative character traits and the relationship of these traits to the duties lawyers are reasonably expected to perform, we hold that substantial evidence supports the Board's conclusion that Stevens would probably injure a client or violate the ethical rules were he admitted to practice in Texas.

Although Stevens presented countervailing evidence of his good character, including evidence of prior public service and letters of

recommendation,[8] this evidence does not conclusively negate the evidence that Stevens fails to meet the minimum standards under our disciplinary rules.

We reverse the judgments of the court of appeals and of the trial court, and affirm the order of the Board of Law Examiners.

John Cornyn
Justice

OPINION DELIVERED: January 5, 1994

APPENDIX B

THE SUPREME COURT OF TEXAS

No. D-3694

THE BOARD OF LAW EXAMINERS
OF THE STATE OF TEXAS, PETITIONER

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[8]Stevens served as a member of the Mississippi House of Representatives for four years in the early 1960s, and also as a military officer in Vietnam. At his hearing, Stevens presented letters of recommendation from a member of the Mississippi Board of Bar Commissioners, the president of the Mississippi State Bar Association, a district judge, former members of the Mississippi legislature, and a former member of the Federal Energy Regulatory Commission.

v.

EDWARD H. STEVENS, III, RESPONDENT

Argued November 4, 1993

ON APPLICATION FOR WRIT OF ERROR TO THE
COURT OF APPEALS FOR THE
THIRD DISTRICT OF TEXAS

JUDGMENT

THE SUPREME COURT OF TEXAS, having heard this cause on writ of error to the Court of Appeals for the Third District, and having considered the appellate record and the argument of counsel, is of the opinion that the judgment of the court of appeals should be reversed.

IT IS THEREFORE ORDERED, in accordance with the Court's opinion, that:

1) The judgment of the court of appeals is reversed;

2) The judgment of the trial court is reversed;

3) The order of the Board of Law Examiners is affirmed;

4) The Board of Law Examiners of The State of Texas shall recover from Edward H.

Stevens, III, who shall pay, the costs in this Court, the court of appeals, and in the trial court.

A copy of this judgment and of the Court's opinion is certified to the court of appeals and to the District Court of Travis County, Texas, for observance.

(Opinion of the Court delivered by Justice Cornyn)
January 5, 1994
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APPENDIX C

IN THE COURT OF APPEALS,
THIRD DISTRICT OF TEXAS, AT AUSTIN

JUDGMENT RENDERED OCTOBER 7, 1992

NO. 3-92-005-CV

THE BOARD OF LAW EXAMINERS OF THE STATE OF TEXAS v. EDWARD H. STEVENS, III
APPEAL FROM 250TH DISTRICT COURT OF TRAVIS COUNTY
BEFORE JUSTICES POWERS, ABOUSSIE AND B. A. SMITH
AFFIRMED--OPINION BY JUSTICE B.A. SMITH

THIS CAUSE came on to be heard on the transcript of the record of the court

below, and the same being considered, because it is the opinion of this Court that there was no error in the trial court's judgment: IT IS THEREFORE considered, adjudged and ordered that the judgment of the trial court be and is hereby in all things affirmed. It is FURTHER ordered that the appellant, The Board of Law Examiners of the State of Texas, pay all costs of this appeal and that this decision be certified below for observance.

IN THE COURT OF APPEALS,
THIRD DISTRICT OF TEXAS, AT AUSTIN

NO. 3-92-005-CV

THE BOARD OF LAW EXAMINERS OF
THE STATE OF TEXAS, APPELLANT

vs.

EDWARD H. STEVENS, III, APPELLEE

FROM THE DISTRICT COURT OF TRAVIS COUNTY,
250TH JUDICIAL DISTRICT, NO. 441,226,
HONORABLE JERRY DELLANA, JUDGE PRESIDING

The Texas Board of Law Examiners ("the Board") denied Edward H. Stevens,

III's application for admission to the State Bar of Texas on the basis that he lacks "good moral character." Stevens sought judicial review of the Board's denial in the Travis County district court, which concluded that the Board's decision was not supported by substantial evidence. Accordingly, the district court reversed the Board's decision and remanded the cause for further proceedings. By a single point of error, the Board complains that the district court erred in finding that the Board's order was not supported by substantial evidence. We will affirm the district-court judgment.

BACKGROUND

Stevens, a member of the Mississippi State Bar for approximately twenty years, applied for admission to the State Bar of Texas in August 1985. In his application, Stevens disclosed two civil judgments rendered against him for

outstanding debts. Stevens indicated that he was financially unable to satisfy the judgments. Supplemental investigations revealed a third unsatisfied judgment as well as past difficulties with the Internal Revenue Service stemming from Stevens's failure to pay income taxes and file returns. Following a hearing in February 1988, the Board notified Stevens that his request for admission to the Texas Bar was denied.

DISCUSSION

To deny an application because of a deficiency in the applicant's moral character, the Board must find a "clear and rational connection between a character trait of the applicant and the likelihood that the applicant would injure a client or obstruct the administration of justice if the applicant were licensed to practice law." Tex. Gov't Code Ann. § 82.028

(c)(1)(West 1988); see also Rule II(b) of the Rules governing Admission to the State Bar of Texas.[1] As we understand the statute and the rule, the ultimate fact for the Board's determination is whether the applicant lacks good moral character. This ultimate fact is to be inferred from the basic fact that the applicant possesses character traits likely to impede the proper discharge of his professional obligations. Pursuant to the Rules Governing Admission,[2] the district court reviews the Board's

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[1]Rule II(b) provides:

> The purpose of requiring an applicant to possess present good moral character is to exclude from the practice of law those persons possessing character traits that are likely to result in injury to future clients, in the obstruction of the administration of justice, or in the violation of the code of Professional Responsibility.

[2]All further citations to rules will refer to the Supreme Court's Rules Governing Admission to the State Bar of Texas.

denial of an application to determine whether or not it is reasonably supported by substantial evidence. Rule XI(m).

An agency order is supported by substantial evidence if the evidence as a whole is such that reasonable minds could have reached the conclusion that the agency reached. Texas State Bd. of Dental Examiners v. Sizemore, 759 S.W.2d 114, 116 (Tex. 1988), cert. denied, 490 U.S. 1080 (1989). While substantial evidence is more than a mere scintilla, the evidence in the record may actually preponderate against the agency's decision and still amount to substantial evidence. Lewis v. Metropolitan Sav. and Loan Ass'n, 550 S.W.2d 11, 13 (Tex. 1977). The test is not whether the agency reached the correct decision, but whether some reasonable basis exists in the record for the action taken by the agency. Texas Health Facilities Comm'n

v. Charter Medical-Dallas, Inc., 665 S.W.2d 446, 452 (Tex. 1984).

Consideration of the Board's point of error requires scrutiny of the administrative record on Stevens's application. Our efforts at review are hindered because the record appears haphazardly in the transcript rather than as a discrete exhibit in the statement of facts.[3]

We find no formal Board order in the administrative record. Rather, the Board informed Stevens of the reason for its decision by a letter to his

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[3]Proceedings before the Board are not subject to the Administrative Procedure and Texas Register Act, Tex. Rev. Civ. Stat. Ann. art. 6252-13a (West Supp. 1992). Hence, the party seeking judicial review of a Board decision need not follow APTRA § 19(d)(3), which requires the party to offer the agency record into evidence before the district court. This Court has previously observed, and we reiterate, that all concerned would benefit form observance of APTRA § 19(d)(3). See Texas State Bd. of Law Examiners v. Malloy, 793 S.W.2d 753, 755 n.2 (Tex. App.--Austin 1990, writ denied).

attorney. In the absence of a more formal document, we will treat the letter as the Board's order. Included in the letter is the Board's explanation for its decision:

> After considering all of the evidence and testimony, the Board voted that EDWARD H. STEVENS, III['s], application be denied because he lacks the present good moral character required for admission by the Rules Governing Admission to the Bar of Texas and by the Statues. In support of this decision, the Board found:
>
> (1) that EDWARD H. STEVENS, III, has demonstrated a marked disrespect for the law as shown by his failure to file federal income tax returns for a number of years and by his failure to arrange for satisfaction of three (3) outstanding civil judgments based upon non-payment of various debts;
>
> (2) that EDWARD H. STEVENS, III, has demonstrated a long-standing lack of financial responsibility in his dealings with creditors and the Internal Revenue Service;
>
> (3) that there is a clear and rational connection between the applicant's disrespect for the law and his lack of financial responsibility on the one hand and the

likelihood that he will injure a client, obstruct the administration of justice or fail to carry out his responsibilities if he is licensed to practice law on the other, and;

(4) that EDWARD H. STEVENS, III, does not possess the present good moral character as defined in Rule II(b) of the Rules Governing Admission to the Bar of Texas and as required by Section 82.018 [sic](1) and (2) of the Texas Government Code.

From our reading of the hearing transcript, we conclude that there is substantial evidence in the record to support the Board's finding that Stevens has a disrespect for meeting his tax obligations and lacks financial responsibility. Stevens testified that he had not filed a tax return for fourteen years, from 1972 to 1986. Furthermore, though his income taxes were withheld from his pay for the approximately four-year period of his employment with the United States Army Corps of Engineers, he apparently

remained delinquent in his tax liability for 1972 and the years from 1978 to 1984.

The evidence indicates that Stevens's initial failure to pay his 1972 income tax resulted from the negligence of his accountant. However, even when he became aware,in 1974 or 1975, that he had fallen delinquent in his income tax obligations, Stevens took no action to rectify his mistake, apparently fearing repercussions should he divulge the problem to the IRS. Not until 1984 did Stevens take steps to remedy the situation by consulting a tax lawyer.

Given this evidence, we believe that the Board could reasonably find that Stevens possessed a disrespect for his obligations to the IRS and a lack of financial responsibility. We are, however, unable to find any evidence, much less substantial evidence, to support the Board's finding that there

is a clear and rational connection between the character traits found and the likelihood that Stevens will injure a client, obstruct the administration of justice, or fail to discharge his duties as a lawyer. On the contrary, the record contains ample evidence that Stevens is a capable attorney respected by his peers. Letters of recommendation from the President of the Mississippi Bar Association, from a member of the Mississippi Board of Bar Commissioners, and from other prominent members of the profession testify to Stevens's integrity and honesty.

The Board contends that it considered the recommendations on Stevens's behalf in reaching its decision, but found that the direct evidence of tax problems and outstanding judgments allowed it to infer the ultimate fact that Stevens lacked good moral character. The Board, relying on Cusson v. Firemen's &

Policemen's Civil Service Commission, 524 S.W.2d 88, 90 (Tex. Civ. App.--San Antonio 1975, no writ), claims it may infer the existence of any ultimate fact from the existence of a basic fact presented by direct evidence. While we accept the principle Cusson articulates, we cannot see how it supports the Board's decision.

Although direct evidence exists to support the inference that Stevens has as character traits a disrespect for his tax obligations and a lack of financial responsibility, there is no direct evidence to support an inference that these character traits are likely, for instance, to injure future clients. Instead, the record presents uncontroverted evidence that Stevens is respected by his peers and is a lawyer in good standing in Mississippi. We hold that no substantial evidence exists in the record to support the Board's

finding that certain of Stevens's character traits are likely to prevent the proper discharge of his professional obligations. Therefore, the Board may not reasonably infer the existence of the ultimate fact, that Stevens lacks good moral character, since there is no substantial evidence to support the underlying basic fact.

CONCLUSION

For the reasons given, we overrule the Board's point of error and affirm the judgment of the district court.

Bea Ann Smith, Justice

[Before Justices Powers, Aboussie and B.A. Smith]
Affirmed
Filed: October 7, 1992
[Do Not Publish]

APPENDIX D

A letter dated April 19, 1988, from Wayne E. Denton, Executive Director of the Texas Board of Law Examiners, to Nicolai von Kreisler.

"This letter is in response to your letters of February 24, 1988, and March 22, 1988, in which you request that the Board state in writing the evidence

relied upon and the reasons for denying Mr. Steven's Application.

"On February 22, 1988, you represented Mr. Stevens in a hearing before the Board on his Application for Admission to the Bar of Texas. After considering all of the evidence and testimony, the Board voted that EDWARD H. STEVENS, III, application be denied because he lacks the present good moral character required for admission by the Rules Governing Admission to the Bar of Texas and by the Statutes. In support of this decision, the Board found:

"(1) that EDWARD H. STEVENS, III, has demonstrated a marked disrespect for the law as shown by his failure to file federal income tax returns for a number of years and by his failure to arrange for satisfaction of three (3) outstanding civil judgments based upon non-payment of various debts;

"(2) that EDWARD H. STEVENS, III, has demonstrated a long-standing lack of financial responsibility in his dealings with creditors and the Internal Revenue Service;

"(3) that there is a clear and rational connection between the applicant's disrespect for the law and his lack of financial responsibility on the one hand and the likelihood that he will injure a client, obstruct the administration of justice or fail to carry out his responsibilities if he is licensed to practice law on the other; and

"(4) that EDWARD H. STEVENS, III, does not possess the present good moral character as defined in Rule II(b) of the Rules Governing Admission to the

Bar of Texas and as required by Section 82.018(1) and (2) of the Texas Government Code.

"In making this decision, the Board considered all evidence and testimony presented. The following evidence relates to the specific findings set out above:

"(1) See Board Exhibit 4, 5, 6, & 8; Applicant's Exhibits 8 & 12; and transcript pages 5-7, 13, 14, 17-19, 21-30, 42-54, 59 & 60.

"(2) See Board Exhibit 4, 5, & 6; and transcript pages 5-7, 13-14, 17-18, 27-30, 54.

"(3) & (4) See evidence cited above and the transcripts and exhibits generally.

"The above specified evidence covers the major evidentiary points influencing the Board's decision, but is not all-inclusive.

"You will have sixty days from the date of this letter to file an appeal in the District Courts of Travis County.

"Prior to the hearing you were provided with copies of all Board Exhibits. Enclosed is a copy of the transcript of the hearing.

"You may contact me or Bruce Wyatt if you have any questions."

Wayne E. Denton, Executive Director of the Texas Board of Law Examiners

A letter dated February 23, 1988, from Wayne E. Denton, Executive Director of the Texas Board of Law Examiners, to Nicolai von Kreisler.

"On February 22, 1988, you appeared before the Board of Law Examiners and represented Mr. Stevens in a hearing on his application for Admission to the Bar of Texas. This letter is to confirm the information given to you on the telephone.

"After considering the evidence and testimony, the Board voted to deny Mr. Stevens (sic) Application for Admission to the Bar of Texas. This decision was based upon the belief that he did not possess the present good moral character required by the Rules Governing Admission to the Bar of Texas and by the statutes.

"You may contact Bruce Wyatt if you have any questions."

Wayne E. Denton, Executive Director of the Texas Board of Law Examiners

APPENDIX E

Applicable State Laws.

TEXAS GOVERNMENT CODE SECTION 82.028

§ 82.028. Moral Character and Fitness of Applicant

(a) The Board of Law Examiners may conduct an investigation of the moral character and fitness of each applicant for a license.
(b) The board may contract with public or private entities for investigative

services relating to the moral character and fitness of applicants.

(c) The board may not recommend denial of a license and the supreme court may not deny a license to an applicant because of a deficiency in the applicant's moral character or fitness unless:

(1) the board finds a clear and rational connection between a character trait of the applicant and the likelihood that the applicant would injure a client or obstruct the administration of justice if the applicant were licensed to practice law; or

(2) the board finds a clear and rational connection between the applicant's present mental or emotional condition and the likelihood that the applicant will not discharge properly the applicant's responsibilities to a client, a court, or the legal profession if the applicant is licensed to practice law.

(d) The board shall limit its investigation under this section to those areas clearly related to the applicant's moral character and present fitness to practice law.

TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT, SECTION 8.04

Rule 8.04. Misconduct

(a) A lawyer shall not:

(1) violate these rules, knowingly assist or induce another to do so, or do so through the acts of another, whether or not such violation occurred in the course of a client-lawyer relationship;

(2) commit a serious crime, or commit any other criminal act that reflects adversely on the lawyer's honesty,

trustworthiness or fitness as a lawyer in other respects;

(3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(4) engage in conduct constituting obstruction of justice;

(5) state or imply an ability to influence improperly a government agency or official;

(6) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(7) violate any disciplinary or disability order or judgment;

(8) engage in conduct that constitutes barratry as defined by the law of this state;

(9) fail to comply with article X, section 32 of the State Bar Rules;

(10) engage in the practice of law when the lawyer's right to practice has been suspended or terminated;

(11) violate any other laws of this state relating to the professional conduct of lawyers and to the practice of law.

(b) As used in subsection (a)(2) of this Rule, "serious crime" means any felony involving moral turpitude, any misdemeanor involving theft, embezzlement, or fraudulent misappropriation of money or other property, or any attempt, conspiracy, or solicitation of another to commit any of the foregoing.

Cmt. 1: There are three principal sources of professional obligations for lawyers in Texas: these rules, the State Bar Act, and the State Bar Rules. Article X, section 7 of the State Bar Rules contains a listing of the grounds for discipline under those Rules.

Cmt. 2: Rule 8.04 provides a comprehensive restatement of all forms of conduct that will subject a lawyer to discipline under either these Rules, the State Bar Act or the State Bar Rules. In that regard, Rule 8.04(a)(1) is intended to correspond to article X, section 7(1) of the State Bar Rules; Rules 8.04(a)(2) and 8.04(b) are intended to correspond to the provisions of article X, sections 7(8) and 26 of those Rules; and Rules 8.04(a)(7)-(10) are intended to correspond to article X, sections 7(3), 7(5), 7(6) and 7(7), respectively, of the State Bar Rules. Rule 8.04(a)(11) of these Rules corresponds to a prohibition contained in the last (unnumbered) paragraph of article X, section 7.

Cmt. 3: The only two provisions of article X, section 7 not specifically referred to in Rule 8.04 are addressed by other Rules. In particular, article X, section 7(2)'s provision for imposing discipline on an attorney here for conduct resulting in that lawyer's discipline in another jurisdiction is provided for by Rule 8.05 of these Rules. Similarly, article X, section 7(4)'s provision prohibiting a lawyer from failing either to provide information to a grievance or review committee, or to assert grounds for failure to do so, is made a subject of discipline by Rule 8.01 of these Rules. Violations of either of those Rules, in turn, subjects a lawyer to discipline pursuant to Rule 8.04(a)(1).

Cmt. 4: Many kinds of illegal conduct reflect adversely on fitness to practice law. However, some kinds of offenses carry no such implication. Traditionally in this state, the distinction has been drawn in terms of

"serious crimes" and other offenses. See article X, sections 7(8) and 26 of the State Bar Rules. These Rules continue that distinction by making only those criminal offenses either amounting to "serious crimes" or having the salient characteristics of such crimes the subject of discipline. See Rules 8.04(a)(2), 8.04(b).

Cmt. 5: Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to his fitness for the practice of law, as "fitness" is defined in these Rules. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligations that legitimately could call a lawyer's overall fitness to practice into question.

Cmt. 6: A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief, openly asserted, that no valid obligation exists. The provisions of Rule 1.02(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges to legal regulation of the practice of law.

Cmt. 7: Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust.

RULES OF THE SUPREME COURT GOVERNING BAR ADMISSION, DEFINITIONS AND GENERAL PROVISIONS

Rule II Eligibility For Examination: General

(a) To be eligible for an examination, the applicant shall comply with the requirements of these rules, shall be at least eighteen (18) years of age, of good moral character and fitness, shall possess the educational attainments set out in these rules, and shall be either a citizen of the United States or an alien lawfully admitted to the United States for permanent residence.

(b) Good moral character is a functional assessment of character and fitness of a prospective lawyer. The purpose of requiring an applicant to possess present good moral character is to exclude from the practice of law those persons possessing character traits that are likely to result in injury to future clients, in the obstruction of the administration of justice, or in a violation of the Code of Professional Responsibility. These character traits usually involve either dishonesty or lack of trustworthiness in carrying out responsibilities. There may be other character traits that are relevant in the admission process, but such traits must have a rational connection with the applicant's present fitness or capacity to practice law and accordingly must relate to the State's legitimate interests in protecting prospective clients and the system of justice.

(c) Fitness, as used in these rules, is the assessment of mental and emotional health as if [sic] affects the competence of a prospective lawyer. The

purpose of requiring an applicant to possess this fitness is to exclude from the practice of law any person having a mental or emotional illness of condition which would be likely to prevent the person from carrying out duties to clients, courts or the profession. A person may be of good moral character, but may be incapacitated from proper discharge of his duties as a lawyer by such illness or condition. The fitness required is a present fitness, and prior mental or emotional illness or conditions are relevant only so far as they indicate the existence of a present lack of fitness.

APPENDIX F

Excerpts from February 22, 1988 hearing transcript; In The Matter of Edward H. Stevens, Rule VIII Application for Admission on Motion; Before the Board of Law Examiners in the State of Texas

* * *

Examination by Mr. Watt

Q Mr. Stevens, I understand from talking to Mr. von Kreisler--he and I first spoke about this third Judgment on April 6, 1987--that a third Judgment since you filed your Application has been entered against you. Is that right?

A Yes, sir.

Q Could I ask you why you didn't disclose that before April of 1987?

A Well, I didn't disclose it on the first Application because I hadn't been sued.

Hearing Tr. pp. 13 l. 17 - 14 l. 1

* * *

Q Mr. Stevens, Mr. Cook states in his letter, in Board Exhibit 8, that you testified under oath in 1985 that to the best of your knowledge you had last filed a Federal income tax return in 1972.

A Yes, sir, that's correct.

Q That accurately reflects our testimony?

A Yes, sir.

Hearing Tr. p. 16 ll. 3-13

* * *

presentation by Nicolai von Kreisler:

> We're talking about three different Judgments. The first one is dated . . . It's July '78 in the amount of $5,359.77 with interest running at 8 percent. . . . I cannot calculate the interest. I mean that's the best I can do is just give you the principal amount.
>
> The second Judgment which was also identified in Mr. Stevens' original Application . . . This credit card account has a Judgment that, counting accrued interest, and so forth, up to the time of the Judgment, plus attorneys' fees, totaled as of November '83, $15,525.74. This one also has interest of 8 percent from November, 1993.
>
> The third Judgment that was mentioned here . . . It had to do with debt

owed on a car and a trailer. The Judgment which was entered in March, 1986, was in the amount of $38,082.53. I do not know what rate of interest the Judgment is accruing at.

Those are the three Judgments that we're talking about. Those are the only Judgments. The one point that I would make is that the last one was rendered and entered; that is the $38,000 one, well after Mr. Stevens applied . . .

Hearing Tr. pp. 17 l. 7 - 18 ll. 1-22

* * *

Examination by Mr. von Kreisler

Q Mr. Stevens, I'm going to show you what's been marked as Applicant's Exhibit No. 8 and . . . 12. . . . No. 12 is an Affidavit. Why don't you read into the record what the Affidavit says.

A. It's an Affidavit executed by Hamilton Jones . . . "I examined the financial records which Mr. Stevens had and prepared his returns. The total tax liability for each year is reflected in the returns I prepared and the checks with which Mr. Stevens paid the taxes. I did not attempt to compute the interest or penalties which he owes. I left this to the IRS because it has been my experience that the tax preparer's figures are never exactly the same as IRS's computations. Mr. Stevens has been paying the interest and penalties as they have been assessed, with the exception of the tax years 1981, 1982, and 1983. It appears to me

that the IRS has overpenalized him for these years. I am trying to find out the method of computation used by the IRS. Mr. Stevens has agreed to pay whatever amount at which we finally arrive.

"Returns were filed for all years for which I was able to find or develop records. Returns were filed for seven prior years."

Q Tell the Board, please, who Hamilton Jones is.

A Hamilton Jones is an attorney who's licensed . . . in the State of Missouri but doing tax work. He's a tax attorney . . . worked for the IRS for fifteen years as a tax attorney.

Q Does the Affidavit state the facts accurately?

A Yes, sir.

Q Did you file tax returns for the years he's talking about?

A Yes, sir.

Q On . . . No. 8, tell the board what those checks represent.

A They represent my payments to the IRS.

Q Is that going to be for different years since 1981?

A (no response.)

Q Are these not the checks that accompanied the returns filed by Mr. Jones?

A I assume they are. . . . the money from these checks came from my brother. They're made on his account and he -- we-- Mr. Jones advised us to put the date on the check for each tax year and my brother didn't do it. He doesn't have it.

Q When Mr. Jones in his Affidavit says, "The total tax liability for each year is reflected in the returns I prepared and the checks with which Mr. Stevens paid the taxes --

A These seven checks are the checks that accompanied the returns for the seven years.

Q As far as you know, have you met all your obligations as to the applicable taxable years?

A Well, yes, sir, . . . that doesn't represent the interest and penalties since then, and I don't know which years. I could probably dig them out.

Q Well, Mr. Jones is trying to let the IRS determine what the interest and penalties are.

A They have and . . . we have paid some of the years. They didn't send them all back to me at one time. On a couple of occasions, they sent me some kind of form letter, and it stated that they received my returns and I owe "x" number of dollars, but they didn't give me the credit for the money that I'd already paid. On the instruction of Mr. Jones, I sent them a copy of my brother's check with another check for the difference . . . for the penalties and interest that they assessed.

Q The bottom line is you're waiting for some assessment of penalties and interest, if any?

A Well, I think we just about got them all, . . . except this '81, '82,'83. I thought that -- what was happening in '81 and '82 and '83--I keep getting the stuff from the IRS--was that they were still not giving me credit for the checks that I had already paid. I went to Mr. Jones, and Mr. Jones examined them. He said, No., I don't think -- . . . He said, "The problem now, it appears to me, is that they're just overpenalizing you."

We've been back and forth with the IRS. For a time . . . they wouldn't discuss the case with Mr. Jones because they had lost my Power of Attorney . . . So we sent them three Power of Attorneys, . . . One time she got me on the phone, someone in Atlanta, and we explained the problem . . . She said the computer was down . . . I think her name was Mrs. Grinder. Next week Mr. Jones called and asked for her. Atlanta said they didn't know a Mrs. Grinder. As far as I know, . . . I paid all the taxes for the seven years. . . . I think I paid all the interest and penalties for all the years except '81, '82, and '83, and . . . I'll pay whatever they finally tell me I owe them.

Q Is he working on the --

A He's working on it now.

Q Let me ask my question. The only things that are outstanding, so far as you know, for tax liability is going to be penalty and interest on

the three years you mentioned. Is that correct?

A Yes, sir, I think so.

Q Is Mr. Jones working on that for you?

A Yes, sir.

Q How long has Mr. Jones been working on this tax project for you?

A Mr. Jones, . . . had my records for approximately, I think, as much as two years before this confrontation with Mr. Cook.

Q So that would antedate the time of your filing for licensure in Texas?

A Yes, sir.

Q In other words, you were working on your tax problem before you even applied to Texas?

A Yes. Mr. Jones was working on it. That's why he had all of what data that I had.

Q The bottom line is if you have any tax liabilities, so far as you're aware, it's going to be for interest and penalties on '81, '82, and '83, and Mr. Jones is working on that?

A To the best of my knowledge, yes sir.

Hearing Tr. pp. 22 l. 1 - 27 ll. 1-5

* * *

Q As to the three Judgments, . . . when you borrowed the money . . . did you intend to repay the money?

A I haven't been able to pay that.

Q Likewise, the LNB, Louisiana National Bank debt in the approximate amount of $15,000?

A No, sir, I haven't been able to pay that.

Q And the more recent one, the First National Bank of Saint Tammany Parish, are you able to pay that?

A No, sir. . . .

Hearing Tr. p. 28 ll. 4-25

* * *

Q Do you have other debt besides what we have talked about here today?

A I don't have any debts that are overdue besides what's here, that I know, that I'm aware of.

Q You have no outstanding back loans?

A No.

Q Do you have any plastic, any credit card debt?

A No.

Q If you had any debt, would it be in the course of business?

A There might be some credit card -- I'd be hesitant to say under oath that for certain, for sure, that I don't owe on some of the previous credit cards. I might; I don't know.

Q The Judgments that we've talked about, do you have any other Judgments against you?

A No, sir, not that I'm aware of.

Hearing Tr. p. 29 ll. 3-21

* * *

Q Would you tell the board something about your law practice; . . . what your do; how you making [sic] a living as a lawyer.

A Well, I haven't made a living as a lawyer for all of the years since 1978. I've had to supplement my income by borrowing from my mother.

Hearing Tr. p. 30 ll. 16-21

* * *

Q I'm going to ask you to look at what's been marked as Applicant's Exhibits 1, 2, and 3. . . . No. 1 is a letter to the Board . . . dated June 9, 1987, from Lonnie Smith. Who is Lonnie Smith, please, sir?

A Lonnie Smith is a member of the Mississippi Board of Bar Commissioners.

Q . . . No. 2, a letter dated May 5, 1987, . . . is from Joseph R. Meadows. Who is Mr. Meadows?

A Mr. Meadows is presently president of the Mississippi State Bar Association.

Q And he knows you also?

A Yes, sir, as reflected in the letter.

Q . . . No. 3 dated May 4, 1987, is a letter from John H. Holloman . . . Who is Mr. Holloman?

A Mr. Holloman is a partner in a firm, a Jackson firm, of Watkins, Ludlam & Stennis. Previous to that . . . he had been chief counsel for the Judiciary Committee of the United States Senate, and he was appointed to the Federal Power Commission by President Ford for an unexpired term and then reappointed by President Ford for a full term before he resigned and went back into private practice.

Q You were in the -- is it the House of Delegates, House of Representatives --

A House of Representatives.

Q -- in Mississippi. What years what that?

A 1960 to '64.

Q Do you know these people from those days, the early sixties?

A Yes, sir.

Hearing Tr. pp. 31 - 32 ll. 1-10

* * *

Q And the copy of the 795 Federal Reporter, 2d Series, Page 482, is that the lawsuit you represented Mr. Jones in?

A Yes, sir.

Q That's labeled Applicant's Exhibit No. 9. Is that the lawsuit you represented him in?

A Yes, sir.

Q This is a 5th Circuit case?

A Yes, sir.

Q Did you ever receive any lump sum of money out of this case that you could have applied to some debt?

A No, sir.

Q Are Mr. Cook's allegations just wrong; in other words, you did not receive $30,000?

A I did not receive $30,000.

Hearing Tr. p. 39 ll. 4-18

* * *

Q Are you subject to any inquiries, investigations, disciplinary actions or any involvement with the equivalent in Mississippi of what I would call our Local District Grievance Committee here in Texas?

A No, sir.

Q If I say the Mississippi State Bar generally -- let me ask the question again that way.

A No, sir.

Q Is the fact that you have judgments against you or . . . outstanding tax liabilities, has that been the subject of any interest by the Mississippi State Bar?

A No, sir.

Q . . . you're not under any sanctions, penalties, or investigations or anything else?

A No, sir.

Q Are you a lawyer in good standing in Mississippi?

A Yes, sir.

Hearing Tr. pp. 41 l. 8 - 42 l. 1

* * *

Q How is it you got so many years behind?

A Well, there was a CPA in my home town that prepared my tax returns in 1971 and '72, . . . In the year I went to work for the Corps of Engineers, . . .I had given him my material for my tax return and he said . . . he had gotten an extension. . . . I didn't hear from him. I tried to call him. Ben Popular was his name. Mr. Popular became very reclusive, and finally I wrote him a letter and told him that I had to have them. I had to file them. By that time I was another year behind. That must have been about '74 or '75. He sent the material that he had back to me.

Quite honestly, I was afraid to face up to the IRS. Of course, I was working for the Corps of Engineers and they were -- I mean I was paying. I wasn't worrying about that. . . .

Hearing Tr. pp. 43 l. 10 - 44 ll. 1-4

* * *

Q When did you first go to Mr. Jones to try to get him to take care of this tax business for you?

A That's reflected somewhere. . . . I think it said 1984, one of the documents.

Hearing Tr. p. 44 ll. 19-22

* * *

Examination by Mr. Arroyo

Q From 1972 until 1986, . . . you didn't file any income tax returns?

A That's correct, until these were filed.

Q Don't they come looking for you? I'm kind of amazed by that.

A Sir, I'm amazed by it, too.

Q I mean I've heard of an attorney who didn't file them in three years and he ended up in jail. I don't know how that works.

A I don't know either.

Q At any rate, they never did; they never came looking for you?

A No, sir.

Q When you filed your returns, what was your motivation?

A My motivation was to get straight with IRS. I knew there would been [sic] a day a reckoning.

Q But they hadn't threatened you with anything?

A No, sir.

Q They hadn't sent you a letter?

A I hadn't heard from them, no, sir.

Q It was purely voluntary on your part?

A Yes, sir.

Q By this time you didn't have a lot of the records?

A No, sir.

Q Dating back to '72, '73, '74?

A No, sir.

Q Which, I guess, explains some of those fairly small amounts that were paid on some of those checks. One of those checks is $2,000 or $3,000, but others are $174 and amounts like that.

A I didn't make any money in those years.

Hearing Tr. pp. 46 l. 16 - 47 ll. 1-23

* * *

Q I've got an Affidavit here from Hamilton Jones.

A Yes, sir, dated 6 April 87.

Q You gave him the records in '84?

A Yes, sir.

Q In late '84, but the returns weren't actually filed until '86?

A Yes, sir.

. . .

Q When did you apply here with us?

A 1985, August 28, 1985, . . .

Q So it was after you applied with us that you made your payments to IRS?

A Yes, sir. . . . Mr. Jones had not prepared any returns for me prior to that.

Hearing Tr. p 49 ll. 1-16

* * *

Examination by Mr. Roller

Q What plans do you have to discharge these debts? How are you going to generate the funds?

A If I don't make enough money to satisfy them in my mother's lifetime, I know that I'm going to have to pay them out of . . . my inheritance when she dies.

Hearing Tr. p. 54 ll. 12-17

* * *

Supreme Court, U.S.
FILED
MAY 24 1994
OFFICE OF THE CLERK

No. 93-1666

In The

Supreme Court of the United States

October Term, 1993

EDWARD H. STEVENS, III,

Petitioner,

v.

THE BOARD OF LAW EXAMINERS OF THE STATE OF TEXAS,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Texas

BRIEF IN OPPOSITION

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32 pp

QUESTIONS PRESENTED

Does this Court have jurisdiction to hear a petition for writ of certiorari seeking review of a state court judgment when the petitioner failed to timely and properly raise a federal question in the state courts, and the state court did not render a judgment or decree that addresses the validity of the state statute on federal constitutional grounds?

Does evidence that an applicant failed to file federal income tax returns for the fourteen years immediately preceding his application for a license to practice law support a State's denial of that application on the ground that the applicant failed to meet the "good moral character" qualification standard?

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No. 93-1666

In The

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October Term, 1993

EDWARD H. STEVENS, III,

Petitioner,

v.

THE BOARD OF LAW EXAMINERS OF THE STATE OF TEXAS,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Texas

BRIEF IN OPPOSITION

Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari to review the judgment and order of the Supreme Court of Texas entered in *Bd. of Law Examiners v. Stevens*, 868 S.W.2d 773 (Tex. 1994).

OPINIONS BELOW

Respondent relies upon Petitioner's recitation of the opinions below except to the extent that it alleges that "[t]he opinion and judgment of the lower court, which was reversed by the Texas Supreme Court, appears in

Appendix C." Petitioner's *Appendix C* is a copy of an unpublished opinion that was issued by the intermediate appellate court but was later withdrawn when the Court issued a new opinion. The intermediate appellate court's substitute opinion, which was the one appealed to the Texas Supreme Court, is *Bd. of Law Examiners v. Stevens*, 850 S.W.2d 558 (Tex. App. – Austin 1992) *rev'd* 868 S.W.2d 773 (Tex. 1994).

JURISDICTION

This Court lacks jurisdiction under 28 U.S.C.A. § 1257 (West 1993). As discussed in more detail below in the "Reasons to Deny the Petition," Respondent contends that no jurisdiction exists because the Texas Supreme Court did not render a judgment or decree in which the validity of a state statute was drawn in question on the ground of its being repugnant to the Constitution of the United States.

STATEMENT OF THE CASE

While the statement of the case presented in the petition is basically accurate, Respondent believes it does not focus on the relevant facts or the issue of whether a federal question was properly raised below. Accordingly, Respondent offers this brief supplement to the statement of the case found in the petition.

This case arises from a decision of the Board of Law Examiners for the State of Texas (the "Board") to deny

Stevens's application to be licensed as an attorney. The most salient fact supporting the Board's decision is that Stevens failed to file federal income tax returns over a fourteen year period and, with the exception of a time when taxes were withheld by his employer, failed to timely pay his taxes during that period. Stevens also had two unsatisfied civil judgments that had been entered against him. The Board concluded that Stevens lacked good moral character because he had negative character traits and that there was a clear and rational likelihood that a person with those traits would injure a client, obstruct the administration of justice, or fail to discharge his professional responsibilities if licensed to practice law.

Stevens appealed the Board's decision to state district court contending that the Board's conclusion that he "would probably injure a client or obstruct the administration of justice" was not supported by substantial evidence. No federal constitutional issues were raised. The state district court held that the Board's order was not supported by substantial evidence and remanded the case back to the Board for further proceedings.

A Texas intermediate appellate court affirmed the decision of the state district court by holding that, among other things, Stevens's past misconduct would not violate the Texas Disciplinary Rules of Professional Conduct, and thus that the Board's order was not supported by substantial evidence.

The Board appealed to the Texas Supreme Court contending that the court of appeals had misinterpreted the Rules Governing Admission to the Bar of Texas and the Texas Disciplinary Rules of Professional Conduct. Seven

days before oral argument in the Texas Supreme Court, Stevens filed a supplemental response brief in the Texas Supreme Court. This brief marked the first attempt by Stevens to present a federal constitutional issue in the case. The Texas Supreme Court, however, decided the case on the independent state law grounds properly preserved for its review and did not address any federal constitutional issue.

Stevens now contends that the Rules Governing Admission to the Bar of Texas violate the Fourteenth Amendment to the United States Constitution. Alternatively, he contends that the Rules Governing Admission to the Bar of Texas are unconstitutional as applied to him because the Texas Supreme Court misinterpreted the Texas Disciplinary Rules of Professional Conduct.

REASONS TO DENY THE PETITION

I.

The Court is Without Jurisdiction to Entertain the Petition For Writ of Certiorari As the Petitioner did not Timely and Properly Raise a Federal Question in the Courts Below and the Texas Supreme Court did not Render a Judgment or Decree in Which the Validity of the Texas Rules Governing Admission to the Bar was Drawn in Question on the Ground of Being Repugnant to the Constitution of the United States.

This Court lacks jurisdiction under 28 U.S.C.A. § 1257 (West 1993) because the Texas Supreme Court did not render a judgment or decree in which the validity of a state statute was drawn in question on the ground of its being repugnant to the Constitution of the United States.

Further, this case does not satisfy the general considerations governing review on a writ of certiorari outlined in Rule 10.1 of the Supreme Court Rules.

A. Stevens has not shown and cannot show a timely, properly raised federal question.

Stevens fails to show, in accordance with Rule 14.1(h) of the Supreme Court Rules, "that [a] federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari." Stevens is required to (1) specify the stage in the proceedings, both in the court of first impression and in the appellate courts, at which the federal question was raised; (2) the manner in which it was raised; (3) the way in which it was passed on by the lower courts; and (4) pertinent quotation of specific portions of the record where the matter appears. S.Ct. R. 14.1(h).

Before this Court can find that a state has violated the Constitution, it must be clear from the record that the state court has in fact passed on a federal question. *See e.g. Konigsberg v. State Bar of California*, 353 U.S. 252, 275 (1957). The facts underlying this appeal by Stevens, however, establish that his constitutional issues have not been properly preserved for review by this Court.

In his petition to this Court, Stevens contends that the Texas law of attorney licensure contravenes the due process requirements of the U.S. Constitution because:

> The Texas law of attorney licensure lacks meaningful standards for the assignation of "character traits" and permits the Board to infer, without more, a connection between a negative

> character trait and the likelihood of professional conduct.

Petition, at p. 16. Stevens complains of the discretion given the Board to (1) identify a character trait of the applicant and (2) determine whether there is a rational relationship between the character trait and the likelihood that the applicant will, if licensed, injure a client or violate Texas Disciplinary Rules. He argues that the Texas procedure "exceeds the State's interest to the detriment of an applicant's rights." Petition, at p. 18.

It is evident from the Board's letter ruling, in which the Board notified Stevens of its decision to recommend denial of his application, that the Board followed the procedure outlined by Texas Gov't Code Ann. § 82.028(c) (Vernon 1988) and the Texas Supreme Court's Rules Governing Admission to the Bar of Texas. *See* Petition Appendix D, p. A48. Stevens, however, did not raise his constitutional concerns about the Board's procedure in his original petition to district court when he appealed the Board's judgment. A copy of Stevens's Original Petition is attached as Appendix "A" to this Brief in Opposition.

The district court was required to "determine from the certified record on file whether or not the Board's decision is reasonably supported by substantial evidence." *See* Rule XV(i)(5) of the Rules Governing Admission to the Bar of Texas (West 1993). The certified record on file, however, does not contain any argument by Stevens or his counsel that the Board's licensure procedure is unconstitutional, that the Board violated his constitutional rights, or that the Board's licensing procedure adversely affects the issue of whether there is

substantial evidence to support the Board's order.[1] The district court simply held that the Board's order was not reasonably supported by substantial evidence and remanded the case back to the Board. A copy of the district court's order is attached as Appendix "B" to this Brief in Opposition. Texas law provides that an appeal from any final judgment of the court may be taken by either party in the manner provided for in civil actions generally. *See* Rule XV(i)(6) of the Rules Governing Admission to the Bar of Texas (West 1993). Accordingly, the Board appealed the district court's ruling to the court of appeals and to the Texas Supreme Court in the manner provided for in civil actions generally.

Stevens's only argument regarding the preservation of his constitutional challenge for review by this Court is that he filed a supplemental brief in the Texas Supreme Court pursuant to Tex. R. App. P. 136(d)[2] allegedly

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[1] Even in his petition to this Court Stevens does not contend that the Board's use of the allegedly unconstitutional licensing procedure adversely affected the Texas Supreme Court's determination of whether there was substantial evidence to support the Board's order. In fact, the repeated pattern of conduct – i.e, his failure to file federal income tax returns for fourteen consecutive years – is sufficiently egregious to justify the Board's decision to deny Stevens's application even if the procedure argued by Stevens were employed. Thus, a decision by this Court on Stevens's constitutional challenge would be an advisory opinion which this Court is not permitted to render. *See, e.g., Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977).

[2] Rule 136(d) of the Texas Rules of Appellate Procedure provides as follows:

Rule 136. BRIEFS OF RESPONDENTS AND OTHERS

* * *

raising the issue. Petition, at p. 15. Because the Board's application for writ of error does not raise a constitutional issue and Stevens never filed a cross-point to the court of appeals, Stevens's only argument under Tex. R. App. P. 136(d) is that his constitutional challenge provides an independent ground for affirmance of the district court's holding that the Board's order was not supported by substantial evidence.

Stevens's argument fails, however, because a constitutional challenge in Texas is waived if it is presented for the first time at the Texas Supreme Court. *See Johnson v. Lynaugh*, 796 S.W.2d 705, 707 (Tex. 1990) ("In this court he contends for the first time that section 13.001 violates article I, section 13 of the Texas Constitution, the 'open court' provision. This contention is not properly before us"). In fact, a party to a lawsuit waives the right to raise constitutional issues on appeal if that claim is not presented to the trial court. *City of San Antonio v. Schautteet*, 706 S.W.2d 103 (Tex. 1986); *Cannon v. Lemon*, 843 S.W.2d 178 (Tex. App. – Houston [14th Dist.] 1992, writ denied) (federal constitutional claim waived by failure to raise in trial court). A state procedural rule that forbids the raising of federal questions at late stages in the case, or by any other than a prescribed method, has been recognized as a valid exercise of state power. *Williams v. Georgia*, 349 U.S. 375, 382-83 (1955). Further, briefs and oral arguments before State courts are not part of any record filed

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(d) Reply and Cross Points. Respondent shall confine his brief to reply points that answer the points in the application for writ of error or that provide independent grounds for affirmance and to such cross-points that respondent has preserved and that establish respondent's rights.

with the Supreme Court and cannot be used to establish that a federal question was raised. *Live Oak Water Users' Ass'n v. Railroad Comm'n*, 269 U.S. 354, 357-58 (1926); *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54 (1934).

Stevens's failure to timely and properly raise his federal question denies this Court jurisdiction to review the Texas Supreme Court's judgment on a writ of certiorari. Thus, the petition should be denied.

B. Stevens has not and cannot show that a federal question was adjudicated below as the Texas Supreme Court's decision was based solely on state law.

Stevens's federal question was not "passed on" by the Texas Supreme Court. Stevens contends that the Texas Supreme Court addressed the due process concerns raised by the Board's order, citing *Schware v. Bd. of Bar Examiners of New Mexico*, 353 U.S. 232 (1957), and *Konigsberg*. Petition, at p. 15. However, whether a state court actually considered a federal question is not necessarily demonstrated by the mere citation of Supreme Court decisions in the opinion. *Osborne v. Clark*, 204 U.S. 565, 567-68 (1907). The Texas Supreme Court's opinion, if it is to be helpful in this connection, must explicitly or impliedly recognize the presence of a federal question and render a decision on it.

A review of the Texas Supreme Court's opinion reveals that the court did not, either explicitly or implicitly, render a decision on a federal question regarding the constitutionality of Texas' rules regarding attorney licensure. *See Stevens*, 868 S.W.2d at 774. The issue was purely

a state law question regarding the minimum standards for moral character and fitness contained in the Texas Disciplinary Rules of Professional Conduct, and the process by which courts should review Board decisions regarding licensure of attorneys pursuant to the Rules Governing Admission to the Bar of Texas. *Id.* In particular, the Texas Supreme Court held that:

(1) the court of appeals "mischaracterize[d] the legal standard by which Stevens's conduct must be judged" (868 S.W.2d at 778);

(2) the Texas standard requires the Board to find "a clear and rational connection between *a character trait of the applicant* and the likelihood that the candidate would injure a client or [violate the Texas Disciplinary Rules]" (*Id.*);

(3) the " 'substantial evidence' standard of review applies both to the Board's identification of the applicant's character traits and to its finding that the applicant's character traits are likely to cause future injuries to clients or violations of the Texas Disciplinary Rules" (*Id.*);

(4) the "substantial evidence" review of the "clear and rational connection" issue presents a mixed question of fact and law which requires a case-by-case examination of the facts; (868 S.W.2d at 781);

(5) the evidence that Stevens repeatedly disregarded his legal duties by not filing federal income tax returns for fourteen years was substantial evidence to support the Board's conclusion that Stevens demonstrated a

marked disrespect for the law and that he lacked financial responsibility (*Id.*);

(6) a "willful failure to file a tax return constitutes attorney misconduct subject to discipline" pursuant to Rule 8.04(a)(2) of the Texas Disciplinary Rules of Profcssional Conduct (868 S.W.2d at 780);

(7) "the Board could reasonably conclude that Stevens, with knowledge of his obligations, willfully chose to delay filing his returns" (*Id.*);

(8) Stevens's "fourteen year failure to file income tax returns constitutes dishonest conduct that would violate" Rule 8.04(a)(3) of the Texas Disciplinary Rules of Professional Conduct (*Id.*), and that;

(9) since "an attorney must act as a counselor and advisor . . . and is frequently entrusted with responsibility for client's assets and affairs . . . there is a clear and rational connection between [Stevens's] disrespect for the law and financial irresponsibility on the one hand, and the likelihood that [he] would injure a client [or violate Texas' Disciplinary Rules] on the other (868 S.W.2d at 781).

The Texas Supreme Court's opinion does not once mention "due process" or the constitutionality of the Rules Governing Admission to the Bar of Texas. The federal question that Stevens puts to this Court simply cannot be extracted from the opinion below.

This petition for writ of certiorari should be denied as Stevens cannot show that he timely and properly

raised a federal question that was passed on by the court of first impression and the state appellate courts so as to give this Court jurisdiction to review the Texas Supreme Court's judgment.[3]

II.

Texas' Denial of a License to Practice Law Based on the Constitutionally Permissible "Good Moral Character" Qualification Standard is Supported by Sufficient Evidence When the Applicant Failed to File Federal Income Tax Returns During the Fourteen Years Immediately Preceding his Application for Admission to the Texas Bar.

Assuming, without conceding, that this Court has jurisdiction over the petition, the petition for writ of certiorari should be denied as it does not raise an important question of federal law. Instead, the Texas statute and the procedures used by the Board are entirely consistent with the constitutional standards for bar admission previously established by this Court.

A. Texas' "good moral character" qualification standard for licensure as an attorney is a constitutionally permissible standard.

"It is undisputed that a State has a constitutionally permissible and substantial interest in determining whether an applicant possesses the character and general

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[3] Even if Stevens could establish that a federal question was properly raised and passed on by the state courts, he has not done so in accordance with Rule 14.5 of the Supreme Court's Rules.

fitness requisite for an attorney and counselor-at-law." *In re Griffiths*, 413 U.S. 717, 722-23 (1973). A State can require high standards of qualification, such as good moral character[4] or proficiency in its law, before it admits an applicant to the bar. *Schware*, 353 U.S. at 239. Any qualification, however, must have a rational connection with the applicant's fitness or capacity to practice law. *Id.*

Stevens does not challenge Texas' requirement that he possess good moral character as a prerequisite to being licensed as an attorney. Instead, he challenges the manner in which the Board makes its determination about an applicant's good moral character. Stevens contends that there is a constitutional requirement that the Board find a direct link between his *conduct* (*i.e.*, his failure to file tax returns for fourteen years) and his fitness or capacity to practice law. *See e.g.*, Application at 19. Texas law, however, requires the Board to find "a clear and rational connection between a *character trait* of the applicant and the likelihood that the applicant would injure a client or violate the Texas Disciplinary Rules of Professional Conduct. *Stevens*, 868 S.W.2d at 778; Tex. Gov't Code Ann. § 82.028(c) (Vernon 1988); Rules Governing Admission to the Bar of Texas IV(b) (1993). Essentially, Texas law establishes a two-step process – (1) does the applicant's conduct establish a negative character

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[4] "From a profession charged with [the responsibility of standing as a shield in defense of right and to ward off wrong] there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as 'moral character.' " *Schware*, 353 U.S. at 247 (Frankfurter, J., concurring).

trait and (2) is there a clear and rational connection between that character trait and the applicant's fitness to practice.

It is difficult to ascertain the source of the constitutional imperative asserted by Stevens. Indeed, the Texas procedure Stevens challenges is merely a more detailed and carefully prescribed means of accomplishing the end he asserts is required – *i.e.*, insuring that there is a rational connection between the applicant's conduct and his fitness to practice. Under the Texas procedure, each step in the process is required to have a basis in evidence and is subject to judicial review.[5] It is unclear what constitutional theory is asserted to require the State to use a one-step rather than a two-step process.

Stevens does assert that the two-step process of identifying a negative character trait and then determining whether there is a connection between that character trait and the applicant's fitness to practice gives the state overly broad discretion. Petition at 21. He contends that the rule is so broad that a person with outstanding library fines, leash law violations, or parking tickets could be found to be disrespectful of the law and thus unfit to practice. *Id.* at 22. The difficulty with Stevens's argument is two-fold. First, as a check against an overly broad exercise of discretion by the Board, the Texas Supreme Court recognized that each step must be supported by

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[5] This "substantial evidence" standard of review applies both to the Board's identification of the applicant's character traits and to its finding that the applicant's character traits are likely to cause future injuries to clients or violations of the Disciplinary Rules. *Stevens*, 868 S.W.2d at 778.

evidence and that each step is subject to judicial review. *Stevens*, 868 S.W.2d at 778. Second, this case does not involve a person with outstanding library fines, leash law violations, or parking tickets. Neither does it involve a youthful indiscretion, an isolated incident, or any other type of situation that would not rise to a level that would reasonably justify rejection of an application. Instead, the facts here reflect a person who, while a licensed attorney in Mississippi, knowingly and repeatedly failed to file federal income tax returns over the fourteen year period immediately preceding his application for licensure in Texas.

The conduct at issue in this case is such that the ultimate outcome of this appeal would not change even if Stevens were to prevail on his constitutional challenge to the Board's procedures. The constitutional imperative enunciated by this Court is simply that any qualification standard imposed by a state must have a rational connection with the applicant's fitness or capacity to practice law, and that a finding that an applicant does not meet the qualification must be supported by record evidence. *Schware*, 353 U.S. at 239. Both Texas law and record evidence in this case satisfy that constitutional requirement.

B. A fourteen year failure to file income tax returns or pay taxes is sufficient evidence to support a State's denial of an application for licensure as an attorney based on the State's "good moral character" qualification standard.

This Court should deny the petition for writ of certiorari unless it concludes that a fourteen year period of

failing to file income tax returns or pay taxes, which ends after an applicant applies for licensure as an attorney in Texas, does not present any evidence upon which the Board could support a finding that the applicant lacks good moral character. *See Schware*, 353 U.S. at 239; *Konigsberg*, 353 U.S. at 273. Such a conclusion by this Court, however, would undermine the American Bar Association's Rules of Professional Conduct (ABA Model Rules), which define the offense of willful failure to file an income tax return as professional misconduct. ABA Model Rule 8.4 cmt. 1.[6] It would also undermine the Texas Disciplinary Rules of Professional Conduct under which Stevens's fourteen year repeated pattern[7] of dishonesty regarding his tax obligation constitutes professional misconduct. 868 S.W.2d at 779-80. The legal profession as a whole would be adversely impacted by such a ruling from this Court.

In both *Schware* and *Konigsberg*, this Court concluded that the applicants' due process rights were violated because there was no evidence to rationally justify a finding that the applicants failed to meet the applicable

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[6] Texas did not adopt the portion of the ABA comment that sets out willful failure to file income tax returns as professional misconduct, but the Texas Supreme Court does not read the omission as disagreement with the ABA formulation of professional misconduct. *Stevens*, 868 S.W.2d at 779-80.

[7] Conduct subject to discipline under Rule 8.04 of the Texas Disciplinary Rules of Professional Conduct includes a pattern of repeated offenses, even ones of minor significance when considered separately, that indicates indifference to legal obligations and calls lawyer's overall fitness to practice into question. Tex. Disciplinary R. Prof. Conduct 8.04 cmt. 5 (1989).

standards for good moral character. *Schware*, 353 U.S. at 239; *Konigsberg*, 353 U.S. at 273. Both cases concerned an applicant who was involved with the Communist Party years before he applied to be licensed to practice law, and whose application was denied for lack of good moral character solely because of his prior political affiliation. In holding that there was no evidence to support the denial of the applications this Court focused on the fact that the applicants had not been involved with the Communist Party for approximately fifteen years prior to the filing of their applications for licensure. *Schware*, 353 U.S. at 246; *Konigsberg*, 353 U.S. at 271. This Court was also concerned about a state's exercising its licensure power in a way that impinged on the applicant's freedom of political expression or association. *Konigsberg*, 353 U.S. at 273. None of those concerns are present under the facts presented by Stevens.

The evidence establishes that Stevens, while a licensed attorney in Mississippi, failed to file federal income tax returns for the tax years 1972 to 1986 because he was afraid to file late tax returns after falling behind a couple of years. In 1986 when he applied to the Board for licensure in Texas, he had hired an accountant to assist him with preparing his returns but had not filed the returns or paid the related taxes. Stevens's repeated pattern of offenses was not some youthful indiscretion that occurred years prior to the filing of his application with the Board as was the case in *Schware* and *Konigsberg*. Also, the Board's reliance on that evidence does not impinge on any of Stevens's constitutionally protected rights such as the freedom of political expression or association. The Board could rationally justify its finding that Stevens

failed to meet the applicable standards for good moral character based on the evidence of Stevens's fourteen year failure to file federal income tax returns. Therefore, there is no basis upon which this Court could conclude that Stevens's due process rights were violated.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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CAUSE NO. 441,226

EDWARD H. STEVENS, III	§	IN THE DISTRICT
	§	COURT OF
v.	§	TRAVIS COUNTY,
BOARD OF LAW EXAMINERS OF THE STATE OF TEXAS	§	TEXAS
	§	
	§	250 JUDICIAL
	§	DISTRICT

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES EDWARD H. STEVENS, III, complaining of the Board of Law Examiners of the State of Texas ("BLE"), Defendant, and for cause of action shows as follows:

I. PARTIES

1. Plaintiff is a resident of Picayune, Pearl River County, Mississippi, an attorney licensed to practice law in the State of Mississippi, and in good standing with the Mississippi Bar.

2. Defendant BLE is a judicial agency duly created under the laws and constitution of the State of Texas and charged with the duties of determining the eligibility and qualifications of candidates and applicants for licenses to practice law in the State of Texas, based on standards and regulations adopted by the Supreme Court. BLE may be served with process herein by serving its executive director, Wayne E. Denton, at the offices of BLE, 510 South Congress Avenue, Suite 116, Austin, Travis County, Texas 78704.

II. JURISDICTION

3. This Court has jurisdiction pursuant to Tex. Govt. Code §82.022(b) and Rule XI(k) of the Rules Governing Admission to the Bar of Texas promulgated thereunder.

III. STATEMENT OF FACTS

4. In this suit, Plaintiff seeks to appeal the BLE's decision to deny Plaintiff's application for admission to the Bar of Texas. Relevant facts are set forth below.

5. From 1960 through 1964, Plaintiff was a member of the House of Representatives of the State of Mississippi. In 1969, Plaintiff was admitted to the Bar of Mississippi. From September 1969 through November 1973 Plaintiff was engaged in the private practice of law in Mississippi; from November 1973 through January 1978 Plaintiff was employed as an attorney with the Corps of Engineers; and from January 1978 through the present Plaintiff has been engaged in the private practice of law in Mississippi.

6. In or around August 1985, Plaintiff applied for admission to the Bar of Texas. In his application and supplementation thereto, Plaintiff disclosed the existence of three unsatisfied judgments pending against him. During its investigation, BLE discovered information which led it to believe that Plaintiff was not current in his obligations to the Internal Revenue Service ("IRS"). In or around October 1987 and again in January 1988 Plaintiff supplemented his application for admission to the Bar of Texas.

7. BLE advised Plaintiff that it was unable to determine from the information available to it in Plaintiff's supplemental application that Plaintiff possessed the good moral character and fitness required for admission to the Bar of Texas.

8. On February 22, 1988, BLE conducted a hearing on Plaintiff's supplemental application. At the hearing, Plaintiff proffered testimony and evidence that he had met his obligations with the IRS. At that time, the judgments against him remained outstanding. Plaintiff has never availed himself of protection under the Federal bankruptcy laws.

9. On February 23, 1988, BLE notified Plaintiff's counsel that it had voted to deny Plaintiff's application for admission. On February 24, 1988, and again on March 22, 1988, Plaintiff made written request to BLE pursuant to Rule XI(i), Rules Governing Admission to the Bar of Texas, for the evidence on which it relied in its decision and reasons for denying Plaintiff's application. As of the filing of this petition, BLE has not responded to Plaintiff's requests.

10. Plaintiff believes that BLE's decision was based on its perception, as stated by its counsel, that Plaintiff's case is about "a continuing pattern of financial irresponsibility" (transcript, p. 59). Evidence presented to BLE substantiates that Plaintiff is competent to practice law and that he possesses good moral character and fitness (Applicant exhibits 1 through 6, 11, 12). The sole issue upon which BLE focused its investigation and based its subsequent denial of Plaintiff's application was Plaintiff's

ability, or a lack thereof, to fulfill his financial obligations on a timely basis.

IV. FIRST CAUSE OF ACTION: JUDICIAL REVIEW

11. This action is brought under Tex. Govt. Code §82.022(b) and Rule XI(k) of the Rules Governing Admission to the Bar of Texas promulgated thereunder, and is a request for judicial review of BLE's decision to deny Plaintiff's application for admission to the Bar of Texas. Plaintiff believes that the BLE's decision was not reasonably supported by substantial evidence and is erroneous as a matter of law.

12. Denial of Plaintiff's application for admission based on the existence of unpaid judgments and late filings of tax returns is not authorized by statute:

> *The board may not recommend denial of a license* and the supreme court may not deny a license to an applicant because of a deficiency in the applicant's moral character or fitness *unless*:
>
> (1) *The board finds* a clear and rational connection between a character trait of the applicant and the likelihood *that the applicant would injure a client or obstruct the administration of justice* if the applicant were licensed to practice law; or
>
> (2) The board finds a clear and rational connection between the applicant's present mental or emotional condition and the likelihood that the applicant will not discharge properly the applicant's responsibilities to a client, a court or the legal profession if the applicant is licensed to practice law.

Tex. Govt. Code §82.028(c) (emphasis added).

13. The evidence and testimony presented by the parties at the hearing on February 22, 1988, does not fall within the language of §82.028(c). While BLE may believe the existence of unpaid judgments and untimely-filed tax returns evidences a "pattern of financial irresponsibility," there is no evidence, and no substantial evidence, that Plaintiff would "injure a client or obstruct the administration of justice" if he were licensed to practice law.

14. Plaintiff reserves the right to amend this petition based on discovery, receipt of the letter requested under Rule XI(i), Rules Governing Admission to the Bar of Texas, or any other matter.

WHEREFORE, PREMISES CONSIDERED, Plaintiff Edward H. Stevens, III prays that this Court remand the matter of Plaintiff's application for admission to the Bar of Texas to Defendant Board of Law Examiners for further proceedings, for an order requiring that Plaintiff's application be granted and Plaintiff be admitted to the Bar of Texas, and for such other and further relief as is deemed fair and just.

Respectfully submitted,

ALVIS, CARSSOW &
von KREISLER,
A Professional Corporation

By /s/ N V Kreisler
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CAUSE NO. 441,226

EDWARD H. STEVENS, III, Plaintiff, V. BOARD OF LAW EXAMINERS OF THE STATE OF TEXAS, Defendant.	§ § § § § § § § §	IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS 250TH JUDICIAL DISTRICT

ORDER

On the 18th day of October, 1991, a hearing was held on this appeal. All parties appeared through their attorneys.

This case is an administrative appeal of a decision by the Board of Law Examiners (the "Board") to deny Edward H. Stevens III a license to practice law in Texas. The Board denied Stevens' application because it found *inter alia* that "he lacks the present good moral character required for admission by the *Rules Governing Admission to the Bar of Texas* and by the Statutes."

After reviewing the administrative record, the parties' briefs, and after listening to the arguments of counsel, the Court finds that the Board's order was not reasonably supported by substantial evidence; it is, therefore,

ORDERED that the Board's decision denying licensure to Stevens is reversed and is set aside in all respects; and, it is further

ORDERED that this case be remanded to the Board for further proceeding consistent with this order.

SIGNED AND ENTERED this 5 day of Nov, 1991.

/s/ Jerry Dellana
JUDGE JERRY DELLANA